

# Article

## The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War

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*The dualism of jus ad bellum and jus in bello is at the heart of all that is most problematic in the moral reality of war.*

—Michael Walzer<sup>1</sup>

*[I]t may happen that neither of the Parties in War acts unjustly. For no Man acts unjustly, but he who is conscious that what he does is unjust; and this is what many are ignorant of.*

—Hugo Grotius<sup>2</sup>

## I. INTRODUCTION

On October 9, 2007, a trial chamber of the Special Court for Sierra Leone (SCSL) sentenced two leaders of the Civil Defence Forces (CDF), one of the parties to Sierra Leone's civil war.<sup>3</sup> The Chamber had convicted them of exceptionally brutal crimes: mutilation, amputation, hacking civilians to death with machetes, and other sadistic killings.<sup>4</sup> Among relevant mitigating factors, however, it noted that the defendants had fought for "a legitimate cause": "to restore the democratically elected Government of President Kabbah."<sup>5</sup> It held that their sentences should therefore be mitigated significantly, for although their conduct transgressed "acceptable limits," they served a "cause that is palpably just and defensible": "facilitating the restoration of democracy, peace and security in [Sierra Leone]"—precisely the objective the Security Council sought to achieve by encouraging the SCSL's establishment.<sup>6</sup> Furthermore, the Chamber opined, absent mitigation, militias in future civil wars might not intervene on behalf of legitimate governments. Their members might fear that they, too, would be judged harshly after the conflict.<sup>7</sup>

The SCSL Appeals Chamber emphatically disagreed, noting that the trial chamber's adoption of just cause as a mitigating factor violated "[t]he basic distinction and historical separation between *jus ad bellum* and *jus in bello*," which it accurately characterized as "a bedrock principle" of the law of war.<sup>8</sup> It also stressed that "[a]llowing mitigation for a convicted person's

1. MICHAEL WALZER, *JUST AND UNJUST WARS* 21 (1977); see also BRIAN OREND, *WAR AND INTERNATIONAL JUSTICE: A KANTIAN PERSPECTIVE* 50 (2000).

2. 2 HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 1130 (Richard Tuck ed., Liberty Fund 2005) (1625) (emphasis omitted).

3. *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-T, Sentencing Judgement (Oct. 9, 2007).

4. *Id.* ¶ 46; see also *id.* ¶¶ 45-48, 52-54. In particular, the Trial Chamber convicted the defendants of violations of Common Article 3 of the Geneva Conventions of 1949, see, e.g., Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III], and of Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, adopted June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

5. *Prosecutor v. Fofana & Kondewa*, Sentencing Judgement, ¶ 83.

6. *Id.* ¶¶ 86-88; see also S.C. Res. 1315, pmb., U.N. Doc. S/RES/1315 (Aug. 14, 2000).

7. *Prosecutor v. Fofana & Kondewa*, Sentencing Judgement, ¶¶ 90-91. But cf. David Luban, *War Crimes: The Law of Hell*, in *WAR: ESSAYS IN POLITICAL PHILOSOPHY* 266, 278 (Larry May ed., 2008) (arguing that "stripping belligerent immunity from rebels may deter surrender and protract civil wars").

8. *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-A, Judgement, ¶¶ 529-30 (May 28, 2008).

political motives, even where they are considered . . . meritorious . . . provides implicit legitimacy to conduct that unequivocally violates the law—the precise conduct this Special Court was established to punish.”<sup>9</sup> In short, for the trial chamber, mitigation based on the “just cause” for which the defendants fought promoted the SCSL’s goals (and those of the law of war generally); for the Appeals Chamber, it undermined them.

This case reflects, in microcosm, a pressing issue in the contemporary law of war. After 9/11, countless scholars and statesmen have called for changes in the *jus ad bellum*, the law governing resort to force, or the *jus in bello*, the law governing the conduct of hostilities.<sup>10</sup> These invitations to reform, whatever their merit, raise an equally vital but distinct legal issue that has been largely neglected in recent legal scholarship: the relationship *between* the traditional branches of the law of war.<sup>11</sup> Since the U.N. Charter introduced a positive *jus ad bellum* into international law, the reigning dogma has been that reflected in the SCSL Appeals Chamber’s opinion: the *jus ad bellum* and the *jus in bello* are, and must remain, analytically distinct. *In bello* rules and principles apply equally to all combatants, whatever each belligerent’s avowed *ad bellum* rationale for resorting to force: self-defense, the restoration of democratic government, territorial conquest, or the destruction of a national, ethnic, racial, or religious group, as such.<sup>12</sup> It is immaterial, on this view, whether the *ad bellum* intent of the militia leaders indicted by the SCSL had been to restore a democratic government or to

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9. *Id.* ¶ 534; accord Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Judgement, ¶ 1082 (Dec. 17, 2004) (“The unfortunate legacy of wars shows that . . . many perpetrators believe that violations of binding international norms can be lawfully committed, because they are fighting for a ‘just cause.’”).

10. The literature is vast. See, e.g., NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS (David Wippman & Matthew Evangelista eds., 2005); Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT’L L.J. 1 (2002); John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004); John B. Bellinger, Legal Adviser to the U.S. Dep’t of State, Speech at Oxford University: Prisoners in War: Contemporary Challenges to the Geneva Conventions (Dec. 10, 2007), available at <http://www.state.gov/s/lrls/96687.htm>. But see Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335 (2004) (arguing that the existing law of war can accommodate contemporary warfare); see also Steven R. Ratner, *Jus ad Bellum and Jus in Bello After September 11*, 96 AM. J. INT’L L. 905 (2002); W. Michael Reisman, *Assessing Claims To Revise the Laws of War*, 97 AM. J. INT’L L. 82 (2003). For the author’s views on some of these issues, see Robert D. Sloane, *Prologue to a Voluntarist War Convention*, 106 MICH. L. REV. 443 (2007).

11. Sir Hersch Lauterpacht, the eminent scholar and former judge of the International Court of Justice, wrote a seminal article on this issue shortly after the introduction of the *jus ad bellum* of the U.N. Charter. H. Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRIT. Y.B. INT’L L. 206 (1953); see also LOTHAR KOTZSCH, *THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW* 83-126 (1956). Christopher Greenwood treated the issue relatively more recently in a brief essay written during the waning days of the Cold War. Christopher Greenwood, *The Relationship Between Jus ad Bellum and Jus in Bello*, 9 REV. INT’L STUD. 221 (1983). The issue has otherwise been largely neglected in postwar legal scholarship. For two recent exceptions, see Alexander Orakhelashvili, *Overlap and Convergence: The Interaction Between Jus ad Bellum and Jus in Bello*, 12 J. CONFLICT & SECURITY L. 157 (2007); and Marco Sassòli, *Jus ad Bellum and Jus in Bello—The Separation Between the Legality of the Use of Force and Humanitarian Rules To Be Respected in Warfare: Crucial or Outdated*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 241 (Michael Schmitt & Jelena Pejic eds., 2007).

12. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

topple that government and install a brutal regime in its stead: they must adhere to and be judged by the same *in bello* rules and principles.

Postwar international law regards this analytic independence as axiomatic,<sup>13</sup> as do most just war theorists. They insist that “[i]t is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules.”<sup>14</sup> In theory, then, any use of force may be simultaneously lawful and unlawful: unlawful, because its author had no right to resort to force under the *jus ad bellum*; lawful, if and to the extent that its author observes “the rules,” that is, the *jus in bello*.<sup>15</sup> I will refer to this particular rule, which insists on the analytic independence of *ad bellum* and *in bello*, as the dualistic axiom. Despite its widespread acceptance,<sup>16</sup> the axiom, as we will see, is logically questionable,<sup>17</sup> undertheorized, and at times disregarded or misapplied in practice—with troubling consequences for the policies that underwrite these components of the contemporary law of war. Consider briefly a few examples, which, among others, will be explored in greater detail below:

- In 1999, the North Atlantic Treaty Organization (NATO) carried out a four-month air campaign against Serbia. At the outset, NATO’s leaders made an *in bello* decision: its pilots would fly at a minimum height of 15,000 feet to reduce their risk from anti-aircraft fire essentially to zero, even though that would increase the risk to Serbian civilians because it often prevented visual confirmation of legitimate military targets. Many would argue that the *in bello* principle of proportionality obliges combatants to take *some* risk in an effort to reduce the risk to enemy civilians.<sup>18</sup> If so, the perceived legitimacy of NATO’s avowed *ad bellum* goal, i.e., to halt the incipient ethnic cleansing of ethnic Albanian Kosovars, influenced

13. See, e.g., IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 406-08 (1963); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 4-5 (2004); Christopher Greenwood, *Historical Development and Legal Basis*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 10, § 101, at 10-11 (Dieter Fleck ed., 2d ed. 2008).

14. WALZER, *supra* note 1, at 21; see also LARRY MAY, *WAR CRIMES AND JUST WAR* 30 (2007); Thomas Hurka, *Proportionality in the Morality of War*, 33 *PHIL. & PUB. AFF.* 34, 35 (2005).

15. Writers often use the phrase “law of war” ambiguously to refer to either or both the *jus ad bellum* and the *jus in bello*. IHL traditionally referred only to that part of the *jus in bello* that protected those rendered *hors de combat*, but today it typically refers to the *jus in bello* generally. For convenience and clarity, throughout this Article, I will use (1) “law of war” to refer to the entire corpus of international law on the use of force; (2) “*jus in bello*,” “law of armed conflict,” and IHL interchangeably to refer to the law governing the conduct of hostilities; and (3) “law on the use of force” and “*jus ad bellum*” interchangeably to refer to the law governing resort to force.

16. See, e.g., *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116 (Dec. 19) (separate opinion of Judge Kooijmans, para. 58); BROWNLIE, *supra* note 13, at 406-08; Lauterpacht, *supra* note 11, at 215-20.

17. See, e.g., Hurka, *supra* note 14, at 44-45; Jeff McMahan, *The Ethics of Killing in War*, 114 *ETHICS* 693 (2004) [hereinafter McMahan, *Ethics of Killing*]; Jeff McMahan, *On the Moral Equality of Combatants*, 14 *J. POL. PHIL.* 377, 379-80 (2006) [hereinafter McMahan, *Moral Equality*]; see also Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 *COLUM. J. TRANSNAT’L L.* 1, 28 (2004) (arguing that the dualistic axiom is subject to “slippery slopes,” which its advocates “arguments have always been normatively and logically insufficient to prevent”).

18. See, e.g., MICHAEL WALZER, *Two Kinds of Military Responsibility*, in *ARGUING ABOUT WAR* 23, 23-24 (2004).

the international ex post appraisal of NATO's *in bello* conduct in the conflict.<sup>19</sup>

- After 9/11, the Bush administration launched and prosecuted what it described as a “Global War on Terror.” In this war, if it is a war,<sup>20</sup> political elites and their lawyers invoked *ad bellum* factors—for example, the novel nature of the conflict or the enemy and the imperative to avoid at any cost another catastrophic terrorist attack—to justify or excuse *in bello* violations.<sup>21</sup> Both treaties and custom, for example, categorically prohibit the *in bello* tactic of torture. It is difficult to dispute that the United States deliberately tortured some detainees in its custody. Alberto R. Gonzales also wrote in what has become an infamous memorandum that “the war against terrorism is a new kind of war,” which “renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.”<sup>22</sup> One might recharacterize this assertion in the framework of this Article as a suggestion that *ad bellum* considerations may justifiably relax, or even vitiate, what some see as anachronistic *in bello* constraints.<sup>23</sup>
- In 1996, the International Court of Justice (ICJ) considered the legality of the threat or use of nuclear weapons.<sup>24</sup> This required it to analyze both the *jus ad bellum* and the *jus in bello*. The Court concluded that the *jus in bello* generally prohibits nuclear weapons—with a curious qualification. It could not say “whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State

19. See *infra* notes 290-314 and accompanying text.

20. See Sloane, *supra* note 10, at 446-47 & nn.19-21. I assume for the purposes of this Article that *some* aspects of the so-called “Global War on Terror,” which I have described in earlier work as an “imprecise, unhelpful, and often counterproductive” label, nonetheless may lawfully be (and, at times, as a matter of policy, perhaps should be) treated within the rubric of war. See *id.* at 447 & n.21. This debate would require a substantial digression, but, in short, I have argued that:

[T]he distinction between terrorism as crime and terrorism as war is not ultimately qualitative. It is, like the question of war itself, something people decide. War has no Platonic form. To suggest that as a matter of international law, a terrorist network by definition cannot be a party to an armed conflict in the twenty-first century strikes me as both inaccurate and anachronistic, although it would be equally implausible and ill-advised to begin treating all or even most acts of terrorism within the rubric of war.

*Id.* at 447 (internal quotation marks and footnotes omitted).

21. See, e.g., Allen S. Weiner, Book Review, 101 AM. J. INT’L L. 241, 244 (2007) (reviewing STEVEN C. NEFF, *WAR AND THE LAW OF NATIONS: A GENERAL HISTORY* (2005)) (noting Neff’s emphasis on “the just war terms in which the ‘war against terrorism’ has been couched,” as well as “that states asserting a right to use force against terrorists have rejected the notion of any moral equivalence between them and their adversaries”).

22. Memorandum from Alberto R. Gonzales, Counsel to the President, Office of Counsel to the President, to George W. Bush, President of the U.S. (Jan. 25, 2002), *reprinted in* THE TORTURE PAPERS 118, 119 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (regarding application of the Geneva Convention Relative to the Treatment of Prisoners of War to the conflict with Al-Qaeda and the Taliban).

23. See *infra* notes 341-358 and accompanying text.

24. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

would be at stake.”<sup>25</sup> Again, to recharacterize this statement in the framework of this Article: if the *ad bellum* consequences for one party to a conflict become bad enough, a weapon otherwise categorically prohibited by the *jus in bello* might become legal for that party, although presumably it would remain illegal for the other—unless that other party, too, “a State,” faced an “extreme circumstance of self-defence.”

The logic in each of these examples is contrary to the dualistic axiom, which insists that *in bello* constraints apply equally to all parties to a conflict. They do not vary based on *ad bellum* appraisals of the justice, legitimacy, or even urgency of one side’s asserted *casus belli* (cause or justification for resort to force).<sup>26</sup> Yet these examples reflect a trend in contemporary international law to relax or disregard the dualistic axiom, that is, to allow *ad bellum* considerations to influence and, at times, even to vitiate the *jus in bello*—an outcome that degrades the efficacy of both components of the law of war. Recent state practice and some jurisprudence also suggest a related, and equally misguided, tendency to collapse the distinct *ad bellum* and *in bello* proportionality constraints imposed by the law of war. As explained in greater detail below, today, in contrast to the pre-U.N. Charter era, all force must be doubly proportionate: that is, proportionate relative to both the *jus ad bellum* and the *jus in bello*.<sup>27</sup> Yet, at times, the ICJ has confused, neglected, or misapplied the two principles, as have belligerents—again to the detriment of the key values and policies that underwrite the contemporary law of war.

Briefly, *ad bellum* proportionality asks whether the initial resort to force or particular quantum of force used is proportional to the asserted *casus belli*.<sup>28</sup> So were one state to invade another in response to, say, an isolated naval incident that damaged one of its warships but caused no casualties, that would be *ad bellum* disproportionate.<sup>29</sup> In contrast, were that warship to return fire in self-defense, or in an effort to deter comparable future strikes, that might well be *ad bellum* proportionate. But in contemporary international law, the analysis should not end there. The reciprocal strike must *also* be *in bello* proportionate, which is a distinct issue. Now the *casus belli* drops out of the analysis. *In bello* proportionality tries to limit needless suffering in war regardless of the *ad bellum* legitimacy (including *ad bellum* proportionality) of each party’s resort to force. It asks whether each *particular* strike will cause

25. *Id.* at 266.

26. *See infra* notes 377-384 and accompanying text.

27. JUDITH GARDAM, NECESSITY, PROPORTIONALITY, AND THE USE OF FORCE BY STATES 10-11 (2004); Greenwood, *supra* note 11, at 223; *see also infra* notes 135-153 and accompanying text.

28. Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 132 (1986) (“[A]cts done in self-defense must not exceed in manner or aim the necessity provoking them.”); *see also id.* at 120 (“Self-defense must not only be necessary but also proportional to the offense in its extent, manner, and goal.”).

29. *See* Oscar Schachter, *The Extraterritorial Use of Force Against Terrorist Bases*, 11 Hous. J. INT’L L. 309, 315 (1989) (describing as grossly disproportionate “the destruction of a city because of a single terrorist incident”).

civilian harm that “would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>30</sup>

The disconnect between international law’s nominal commitment to the dualistic axiom and its corollaries, on the one hand, and the frequent elision or misconstruction of those principles in practice, on the other, is often not (as some may be inclined to think) a mere product of bad faith or of Cicero’s maxim *inter arma silent leges* (amid the arms of war, the laws are silent). It also reflects the dualistic axiom’s somewhat paradoxical nature and a failure to appreciate its true rationale and practical limits. The end of the Cold War and twenty-first-century developments in the nature and law of war—including, for example, the advent of modern transnational terrorist networks, the increasing availability of catastrophic weapons to nonstate actors,<sup>31</sup> and the “humanization” of international humanitarian law (IHL)<sup>32</sup>—invite a reappraisal of the *ad bellum-in bello* relationship: what is it, and what should it be?

This Article ventures answers to these questions. Given the complexity of the field, however, its real aspiration is more modest: to bring these questions back into the vigorous contemporary dialogue about the future shape of the law of war. For they have been conspicuously—and, I think, dangerously—absent from that dialogue. While I defend the dualistic axiom against what I see as its often tacit and subtle erosion, I also try to refine and clarify it so that it better serves the policies that underwrite it: minimizing unauthorized coercion and reducing superfluous suffering in war. Two forms of analytic conflation, in particular, afflict the modern law of war: (1) at the macro level, conflation of the *jus ad bellum* and the *jus in bello* generally, i.e., a failure to apply the dualistic axiom properly or at all; and (2) at the micro level, conflation of the distinct proportionality constraints imposed by each body of law. Both forms of conflation compromise the law’s efficacy relative to the evolving nature of twenty-first-century hostilities. The dualistic axiom remains indispensable to the law of war. But it cannot be applied acontextually—for example, without considering, descriptively, the comparative power of the parties, the technology available to each, and the nature of the conflict.

Furthermore, often, and particularly in the context of “supreme emergency” arguments,<sup>33</sup> conflation may be ascribed in part to a failure to appreciate that *ad bellum* and *in bello* constraints on war presuppose distinct units of value, which correspond roughly to the quintessential distinction between classical and contemporary international law: the *ad bellum* operates principally at the level of politics (often, but not always today, states); the *in*

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30. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 57(2)(a)(iii), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

31. See GORDON CORERA, SHOPPING FOR BOMBS: NUCLEAR PROLIFERATION, GLOBAL INSECURITY, AND THE RISE AND FALL OF THE A.Q. KHAN NETWORK 161-64 (2006); MOISÉS NAÍM, ILLICIT: HOW SMUGGLERS, TRAFFICKERS, AND COPYCATS ARE HIJACKING THE GLOBAL ECONOMY 38-64 (2005).

32. See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 241 (2000).

33. See *infra* notes 195-209 and accompanying text.

*bello* operates principally at the level of individuals. While states and other polities may sometimes possess an "associative" value beyond the "aggregative" value constituted by the sum of the interests of their constituents,<sup>34</sup> they should not be romanticized.<sup>35</sup> I take for granted a premise of liberal political theory: that only human beings, not abstractions like states, merit *foundational* moral weight. That need not prevent ascribing value to collectives insofar as they genuinely represent and serve their constituents,<sup>36</sup> but "any rights states have must derive from and concern their citizens."<sup>37</sup> The significance of this moral postulate will become clear in the course of the argument.

At the outset, however, I should say that it means that fascist, Marxist, and like polities, which ascribe value to collectives qua collectives, will not find some of the following arguments persuasive. It is no coincidence, for example, that the Soviet Union and North Vietnam argued that the victims of aggression need not abide by IHL.<sup>38</sup> Yet I doubt that polities of this sort would in any event have social, political, or moral (as opposed to solely instrumentalist) reasons to conform their initiation and conduct of war to international law. Henkin has famously argued that most international law "does not address itself principally to 'criminal elements' on the one hand or to 'saints' on the other. . . . The law is aimed principally at the mass in between—at those who, while generally law-abiding, might yet be tempted to some violations by immediate self-interest."<sup>39</sup> To guide and regulate *their* initiation and conduct of war is the most that the international law of war, too, may hope to accomplish. It would be quixotic to suppose otherwise. But the point of emphasis is that insofar as the dualistic axiom compels our respect today, it is because of postwar international law's solicitude for the individual as the fundamental unit of value—a feature shared by IHL and international human rights law.<sup>40</sup> Human rights, not the rights of states or other abstractions, underwrite the dualistic axiom.

Given this postulate, contemporary international law must candidly acknowledge consequences of the dualistic axiom that it has tended to elide to date. First, it must recognize that, *descriptively*, discretionary *in bello* judgments—in particular, about *in bello* proportionality—at times vary depending on oft-politicized characterizations of the perceived justice or legality of conflicts. That is, they vary, contrary to the dualistic axiom, based

34. JEAN-JACQUES ROUSSEAU, *On the Social Contract*, in THE BASIC POLITICAL WRITINGS 141, 147-49 (Donald A. Cress trans., Hackett Publ'g Co. 1987) (1762); see also Michael Walzer, *The Moral Standing of States*, in INTERNATIONAL ETHICS 217 (Charles R. Beitz et al. eds., 1985).

35. See David Luban, *The Romance of the Nation-State*, in INTERNATIONAL ETHICS, *supra* note 34, at 238 [hereinafter Luban, *Romance of the Nation-State*]; David Luban, *Just War and Human Rights*, in INTERNATIONAL ETHICS, *supra* note 34, at 208-09 [hereinafter Luban, *Just War and Human Rights*] ("States—patriots and Rousseau to the contrary—are not to be loved, and seldom to be trusted."). But see Walzer, *supra* note 34; Michael Walzer, *The Rights of Political Communities*, in INTERNATIONAL ETHICS, *supra* note 34.

36. See generally WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* (1995).

37. Hurka, *supra* note 14, at 51.

38. See Sassòli, *supra* note 11, at 247.

39. LOUIS HENKIN, *HOW NATIONS BEHAVE* 94 (2d ed. 1979).

40. See, e.g., LOUIS HENKIN, *THE AGE OF RIGHTS* 2-10 (1990); Luban, *Just War and Human Rights*, *supra* note 35; see also W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 872 (1990).



on *ad bellum* judgments. That does not mean that they should. But they do. Despite nominal consensus on the dualistic axiom, international law tends to tolerate more incidental civilian harm ("collateral damage") if the alleged *casus belli* is either (1) widely perceived as legal (for example, a clear and unassailable case of self-defense) or (2) formally illegal but still perceived as legitimate, meaning that it furthers broadly shared international values: preserving minimum order, halting human rights atrocities, and so forth. This may explain, in part, why many accepted NATO's *in bello* decision to fight a zero-casualty aerial war against Serbia to forestall incipient ethnic cleansing rather than insist that it take precautions that could have better enabled NATO's fighter pilots to reduce Serbian civilian casualties—but at the price of some risk to NATO's soldiers.

Second, international law must recognize and respond to the force of recent theoretical objections to the dualistic axiom, which suggest that the answer to the *in bello* question "proportional to what?" logically depends on an *ad bellum* judgment about the justice or legality of the conflict. Some modern theorists argue that the "military advantage anticipated,"<sup>41</sup> to which any collateral damage must be *in bello* proportionate, cannot be hermetically divorced from the goods that justify force. Hurka writes, for example, "[i]f 'military advantage' justifies killing civilians, it does so only because of the further goods such advantage will lead to, and how much it justifies depends on what those goods are."<sup>42</sup> This implies that *in bello* judgments not only do (descriptively) but also must (logically or normatively) depend, at some level of abstraction, on precisely the sort of *ad bellum* judgment that the dualistic axiom insists we exclude.

While the objection is not unassailable even in strict theoretical terms,<sup>43</sup> to adapt Justice Holmes's maxim, the life of the law of war "has not been logic: it has been experience."<sup>44</sup> Even were the dualistic axiom not strictly defensible in normative or ethical terms, as a *legal* convention, it remains grounded in experience and an appreciation of the political and moral reality of war. Respect for the axiom remains indispensable to IHL in practice and almost always serves the goals and values that underwrite it. But those goals and values sometimes prove to be in tension with one another. They cannot be reduced to a simple formula or justified by a single moral theory; rather, they instantiate a complex blend of deontology, teleology, and virtue ethics. Military strategists and political elites will, as they already have, increasingly confront consequent tensions in IHL, which must be candidly confronted, not elided: for example, whether torture, currently prohibited categorically, may ever be justified or excused based on a consequentialist analysis; or whether the imperative to stop a genocide may ever partially relax the *in bello* proportionality constraint.

41. Protocol I, *supra* note 30, art. 57(2)(a)(iii).

42. Hurka, *supra* note 14, at 45; see also McMahan, *Ethics of Killing*, *supra* note 17, at 714-15.

43. See, e.g., Yitzhak Benbaji, *A Defense of the Traditional War Convention*, 118 *ETHICS* 464, 466 (2008) (arguing, *inter alia*, that critiques of the traditional war convention mistakenly presuppose a Hobbesian rather than Lockean conception of the scope of the right of self-defense).

44. OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., Belknap Press 1963) (1881).

Part II traces the evolution of the dualistic axiom. It did not take hold until comparatively late in the history of warfare and remains surprisingly tenuous. Part III explains the sources and logic of conflation: how and why the axiom may be neglected, misconstrued, or misapplied, degrading the efficacy of both the *jus ad bellum* and the *jus in bello*. Part IV then shows how conflation infects some international jurisprudence on, and the practice of, war. It demonstrates the cost of conflation in terms of the law's ability to coherently promote two paramount policies of contemporary international law: minimizing unauthorized coercion and reducing needless suffering. The Article concludes by summarizing how geostrategic changes, war's evolution, and technological advances increasingly challenge the dualistic axiom—and by trying to clarify the axiom to strengthen its ability to resist those developments. In particular, it stresses the need to operationalize and make concrete both *ad bellum* and *in bello* regulatory strategies in a way that belligerents, at least those operating in good faith, may be incentivized to adhere to and to regard as feasible in the circumstances of modern war.

Ultimately, the efficacy and normative force of the international law of war is roughly commensurate to its correspondence to the nature and felt necessities of warfare. Insofar as conflation obscures the need to refine the law of war to adapt to current sociopolitical conditions and to work out practicable conceptions of both *ad bellum* and *in bello* proportionality, it impedes the ability of international law to develop incrementally at both ends of the duality. And insofar as the highly diverse participants in modern warfare see a growing disconnect between the law and moral reality of war, the law may well cease, to that extent, to operate as effectively as it otherwise could to serve the policies that underwrite it.

## II. THE HISTORY OF AN AXIOM: INDEPENDENCE OR INTERDEPENDENCE?

International lawyers and just war theorists alike use the Latin phrases *jus ad bellum* and *jus in bello* to describe, respectively, the law governing resort to force and the law governing the conduct of hostilities. It would be inaccurate to distinguish sharply between the historical evolution of these two traditions, which overlap and continue to influence each other. But they neither can nor should be equated.<sup>45</sup> Just war theory is much older than international law. It originated and evolved principally in theological and ethical, not legal, terms.<sup>46</sup> The law of war developed largely in the nineteenth and twentieth centuries. While influenced by just war doctrine, it reflects humanist, positivist, and political realist responses to the trauma of modern war. That is why the U.N. Charter does not speak of just and unjust wars but only of the "scourge of war, which twice in our lifetime has brought untold sorrow to mankind."<sup>47</sup> Both mainstream just war theory and international law, however, embrace the dualistic axiom and, in both intellectual traditions, this is a surprisingly recent innovation.

45. See McMahan, *Ethics of Killing*, *supra* note 17, at 730.

46. WILLIAM V. O'BRIEN, *THE CONDUCT OF JUST AND LIMITED WAR* 13 (1981); Josef L. Kunz, *Bellum Justum and Bellum Legale*, 45 AM. J. INT'L L. 528, 529-30 (1951).

47. U.N. Charter pmbl.

## A. Evolution of the Dualistic Axiom in Just War Theory

### 1. Ancient and Medieval Origins: Interdependence

The Western concept of *bellum justum* (just war) originated in the early Roman era,<sup>48</sup> at which time it had principally a procedural meaning: a war “preceded by a solemn action taken by the *collegium fetialium*, a corporation of special priests, the *fetiales*,” who would certify to the senate under oath that “a foreign nation had violated its duty toward the Romans” and thereby created a just cause for war.<sup>49</sup> Roman law did not include a distinct *jus in bello*.<sup>50</sup> Within *ad bellum* limits, wars were “essentially unrestrained. Prisoners could be enslaved or massacred; plunder was general; and no distinction was recognized between combatants and noncombatants.”<sup>51</sup> Hence theologians would later refer to ethically unregulated warfare, which justifiably could be waged against infidels, as *bellum Romanum*.

Yet Augustine, the progenitor of theological just war doctrine, likewise said almost nothing about *in bello* issues.<sup>52</sup> He integrated Christian virtues of patience and pacificism with the inherited just war theory of ancient Rome,<sup>53</sup> yielding a substantive conception of just war in contrast to the largely procedural one of Roman law.<sup>54</sup> But insofar as he spoke to issues that might today fall within the *jus in bello* rubric, his admonitions were not independent of, but intertwined with, the *jus ad bellum*. In Augustine’s view, only God’s clear command (as depicted, for example, in the Israelite wars of the Old Testament) could offer reliable assurance of the just nature of a war. Consequently, constraints on the conduct of hostilities were simply the

48. YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 63 (4th ed. 2005). *Jus ad bellum* antecedents exist in the writings of classical Greece, the Hebrew Bible, and elsewhere, but until ancient Rome, none of these can be described accurately as an ethical concept, still less a legal one, of *bellum justum*. See BROWNLIE, *supra* note 13, at 3-4; ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 9-11, 15 (1947) [hereinafter NUSSBAUM, CONCISE HISTORY]; G.I.A.D. Draper, *Grotius’ Place in the Development of Legal Ideas About War*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 177, 177 (Hedley Bull, Benedict Kingsbury & Adam Roberts eds., 1990); Arthur Nussbaum, *Just War—A Legal Concept?*, 42 MICH. L. REV. 453, 453-54 (1943) [hereinafter Nussbaum, *Just War*].

49. Nussbaum, *Just War*, *supra* note 48, at 454; see also BROWNLIE, *supra* note 13, at 4; Draper, *supra* note 48, at 178-79; Joachim von Elbe, *The Evolution of the Concept of the Just War in International Law*, 33 AM. J. INT’L L. 665, 666 (1939).

50. *In bello*, like *ad bellum*, antecedents can be found throughout ancient civilizations. See Deuteronomy 20:10-20; L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 20-23 (2d ed. 2001); THE LAW CODE OF MANU 113 (Patrick Olivelle ed. & trans., Oxford Univ. Press 2004); NUSSBAUM, CONCISE HISTORY, *supra* note 48, at 15; SUN TZU, THE ART OF WAR 26 (Cheng Lin trans., Confucius Publishing Co. 1970) (ca. 510 B.C.); Josiah Ober, *Classical Greek Times*, in THE LAWS OF WAR 12 (Michael Howard, George J. Andreopoulos & Mark R. Shulman eds., 1994); Surya P. Subedi, *The Concept in Hinduism of ‘Just War’*, 8 J. CONFLICT & SECURITY L. 339, 354-57 (2003).

51. Robert C. Stacey, *The Age of Chivalry*, in THE LAWS OF WAR, *supra* note 50, at 27, 27. The same concept prevailed in classical Greek thought: restraints against, for example, enslavement, did not apply in wars against (non-Greek) “barbarians.” See, e.g., PLATO, THE REPUBLIC § 469(b)-(c), at 144 (C.D.C. Reeve ed., G.M.A. Grube trans., 1992) (ca. 380 B.C.).

52. JAMES TURNER JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR 123 (1981); Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT’L L. 391, 395 & n.23 (1993).

53. See FREDERICK H. RUSSELL, THE JUST WAR IN THE MIDDLE AGES 16 (1975); see also Draper, *supra* note 48, at 180; Nussbaum, *Just War*, *supra* note 48, at 455.

54. See von Elbe, *supra* note 49, at 668; see also RUSSELL, *supra* note 53, at 16-39; Kunz, *supra* note 46, at 530.

"inevitable consequences of lack of absolute certainty such as God alone can give."<sup>55</sup> Augustine did, however, preach mercy, and he recognized, if only as a prudential matter, that wars fought without it could endanger the stability of any future peace—the ultimate goal, in his view, of any war.<sup>56</sup>

Aquinas, the principal medieval scholastic who systematically codified and expanded Augustinian just war doctrine,<sup>57</sup> likewise did not develop a distinct *jus in bello*. Although he condemned the deliberate slaughter of noncombatants,<sup>58</sup> this and other scattered theological antecedents did not add up to a coherent conception of *jus in bello* as a set of legal or ethical injunctions.<sup>59</sup> Again, insofar as a theological analogue to the *jus in bello* existed,<sup>60</sup> it remained parasitic on the *jus ad bellum*. Hence, for Aquinas, too, "the justness of the resort to war determined to a large extent the limits on the conduct of war; that is, the *jus ad bellum* and the *jus in bello* were interdependent."<sup>61</sup> In general, in the theological, as in the Roman, tradition, a just cause authorized any means of war, however brutal.<sup>62</sup> Conversely, soldiers who fought in unjust wars were, for that reason alone, deemed criminals—even if they refrained from atrocities such as plunder, rape, and massacre.<sup>63</sup>

Restraints on the conduct of hostilities chiefly evolved as a part of chivalry, a largely secular tradition.<sup>64</sup> As the means of warfare grew more sophisticated in the Middle Ages, medieval war ordinances and customary codes evolved for knights *inter se*,<sup>65</sup> which, although often violated in practice, presaged the later emergence of a distinct *jus in bello*.<sup>66</sup> Yet restraints

55. JOHNSON, *supra* note 52, at xxx.

56. AUGUSTINE, POLITICAL WRITINGS 3-12 (Ernest L. Fortin & Douglas Kries eds., Michael W. Tkacz & Douglas Kries trans., Hackett Publ'g Co. 1994) (ca. 410 A.D.); *see also* NUSSBAUM, CONCISE HISTORY, *supra* note 48, at 41.

57. *See* Draper, *supra* note 48, at 181; James Turner Johnson, *The Just War Idea: The State of the Question*, 23 SOC. PHIL. & POL'Y 167, 177 (2006); Nussbaum, *Just War*, *supra* note 48, at 456-57. Alexander of Hales, Gratian, and other theologians who contributed to the evolution of Christian just war theory, *see* BROWNLIE, *supra* note 13, at 6 & n.4; von Elbe, *supra* note 49, at 669-70, likewise did not develop a distinct *jus in bello*, *see* Stacey, *supra* note 51, at 30-31.

58. John Finnis, *The Ethics of War and Peace in the Catholic Natural Law Tradition*, in THE ETHICS OF WAR AND PEACE 26 (Terry Nardin ed., 1996); *see also* NUSSBAUM, CONCISE HISTORY, *supra* note 48, at 44.

59. *See* Stacey, *supra* note 51, at 30-31; *see also* JOHNSON, *supra* note 52, at 124-50; MAURICE H. KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES 189-90 (1965).

60. Strictly, according to James Turner Johnson, "it is incorrect to speak of classical just war before 1500." Before that time, "there exist[ed] two doctrines, a religious (*i.e.*, theological and canonical) one largely limited to the right to make war (*jus ad bellum*) and a secular one whose almost total content related to the proper mode of fighting (Law of Arms, *jus in bello*)." JAMES TURNER JOHNSON, IDEOLOGY, REASON, AND THE LIMITATION OF WAR 8 (1975).

61. Gardam, *supra* note 52, at 395; *see also* Quincy Wright, *The Outlawry of War and the Law of War*, 47 AM. J. INT'L L. 365, 366 (1953).

62. *See* Gardam, *supra* note 52, at 395. Moreover, "just war could legitimize criminal acts and create a legal title to goods whose taking in other circumstances would be considered robbery." THEODOR MERON, *Shakespeare's Henry the Fifth and the Laws of War*, in WAR CRIMES LAW COMES OF AGE 11, 22 (1998); *see also* Draper, *supra* note 48, at 182.

63. Leon Friedman, *Introduction to 1 THE LAW OF WAR: A DOCUMENTARY HISTORY* 3, 10-11 (Leon Friedman ed., 1972); *cf.* Draper, *supra* note 48, at 182-83.

64. *See* GREEN, *supra* note 50, at 23-25; Stacey, *supra* note 51, at 30-38.

65. *See* THEODOR MERON, *Medieval and Renaissance Ordinances of War: Codifying Discipline and Humanity*, in WAR CRIMES LAW COMES OF AGE, *supra* note 62, at 1.

66. Draper, *supra* note 48, at 185; *see also* Michael Howard, *Temperamenta Belli: Can War Be Controlled?*, in RESTRAINTS ON WAR 5 (Michael Howard ed., 1979). By the end of the Middle Ages,

on war applied only to Christian knights<sup>67</sup> (hence the extraordinary brutality of the Crusades), and the *ad bellum* criterion of “public authority” continued to determine rights and privileges in war, for example, to collect ransom or seize booty.<sup>68</sup> In short, the incipient *jus in bello* remained bound up with highly particularistic conceptions about the propriety of both the warrior and the war. The idea that the *jus in bello* should apply equally to belligerents remained largely foreign to medieval thought, secular and religious alike. In fact, the *jus ad bellum* largely determined the *jus in bello*, insofar as the latter existed.

## 2. The Scholastics: Can a War Be Just on Both Sides?

Not coincidentally, the dualistic axiom’s origins roughly coincide with the emergence of international law in the decades surrounding the Peace of Westphalia. The problem that led to its evolution is a familiar one that persists today: invariably, each party to war claims the mantle of justice for itself and denies it to the other.<sup>69</sup> In the emergent era of decentralized authority, with power dispersed among multiple sovereigns—as opposed to the previous (notionally) uniform authority of the Holy Roman Empire and the Pope—no single sovereign could be the arbiter of the justice of conflicts among them.<sup>70</sup> Consequently, even before Grotius, who often receives principal credit for developing the dualistic axiom,<sup>71</sup> thinkers such as Francisco de Vitoria, Francisco Suárez, and Alberico Gentili began to elaborate justifications for the equal application of the *jus in bello* to just and unjust belligerents alike.<sup>72</sup>

Vitoria, for example, whose views largely reflect those of the later scholastics, explicitly distinguished the categories of *jus ad bellum* and *jus in bello* for the first time,<sup>73</sup> a precondition of the dualistic axiom. He denied that any war could be objectively “just on both sides,” where objective means “in the sight of God.”<sup>74</sup> But he recognized that because of human ignorance, mistake, or uncertainty about the divine will (a problem raised by Augustine a millennium before), all belligerents would often believe, in good faith, in the justice of their *casus belli*. Situations would therefore arise in which a “war may be just in itself for the side which has true justice on its side, and also [apparently] just for the other side, because they wage war in good faith and

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[t]he *jus in bello* included two major elements: a listing of classes of persons who normally, by reason of their personal characteristics . . . or social function, were to be regarded as noncombatants and not to be directly, intentionally attacked during a just war; and some rather moribund efforts to define certain means of war as impermissible because of their inherently indiscriminate or disproportionate effects.

Johnson, *supra* note 57, at 169.

67. JOHNSON, *supra* note 52, at xxiii, 128-29; see also Draper, *supra* note 48, at 184-85; Stacey, *supra* note 51, at 28, 30, 33.

68. Stacey, *supra* note 51, at 31-32; see also KEEN, *supra* note 59, at 137-85.

69. Gardam, *supra* note 52, at 392-94.

70. See DINSTEIN, *supra* note 48, at 66 (4th ed. 2005); see also BROWNLIE, *supra* note 13, at 11.

71. Gardam, *supra* note 52, at 396 & n.29.

72. E.g., THEODOR MERON, *Common Rights of Mankind in Gentili, Grotius, and Suárez*, in WAR CRIMES LAW COMES OF AGE, *supra* note 62, at 122.

73. JOHNSON, *supra* note 52, at 175.

74. JOHNSON, *supra* note 60, at 194.

are hence excused from sin.”<sup>75</sup> In short, epistemic uncertainty about God’s will supplied the initial rationale for the dualistic axiom.

### 3. *Natural Law: The Birth of Secular Just War Doctrine*

Until Gentili, however, who receives general credit for “ridding international law of the shackles of theology,”<sup>76</sup> the dualistic axiom lacked a real secular foundation. Against the scholastic view, Gentili argued from a natural law perspective that war could be objectively just on both sides (not only apparently so because of one belligerent’s mistake).<sup>77</sup> He also reconceptualized noncombatant immunity. Rather than base it on the supposed innocence of certain classes relative to war’s causes, he stressed humanitarian ideals that more closely approximate those of modern IHL<sup>78</sup> and drew “a clear line of demarcation between the legal aspects of the war problem on the one hand, [and] theology and ethics on the other.”<sup>79</sup>

Grotius brought these disparate strands of thought together in his magisterial work *De Jure Belli ac Pacis*. First, echoing the scholastics (and, for that matter, the Socratic view that man does evil only because of ignorance), he argued that while, in principle, “[w]ar cannot be just on both Sides, . . . because the very Nature of the Thing does not permit one to have a moral Power, or true Right, to two contrary Things, as suppose *to do a Thing, and to hinder the doing of it*,” still, “it may happen that neither of the Parties in War acts unjustly. For no man acts unjustly, but he who is conscious that what he does is unjust; and this is what many are ignorant of.”<sup>80</sup> Second, echoing Gentili, he argued from a secular (natural law) rather than a theological perspective that certain restraints should apply equally to all combatants.<sup>81</sup> These included the ethical admonition that noncombatants (for example, women, children, the elderly, farmers, clergy, and merchants), as

75. FRANCISCO DE VITORIA, *POLITICAL WRITINGS* 312-13 (Anthony Pagden & Jeremy Lawrance eds., 1991) (emphasis omitted); see also JOHNSON, *supra* note 60, at 155; Nussbaum, *Just War*, *supra* note 48, at 460. Suárez elaborated similar views. He rejected the idea of excusable ignorance but recommended that, should both belligerents claim to be fighting justly, they submit to arbitration. See 2 FRANCISCO SUÁREZ, *On War (Disp. XIII)*, in *SELECTIONS FROM THREE WORKS* 815-16 (James Brown Scott ed., Gwladys L. Williams, Ammi Brown & John Waldron trans., Clarendon Press 1944) (1621); see also JOHNSON, *supra* note 60, at 194; NUSSBAUM, *CONCISE HISTORY*, *supra* note 48, at 69.

76. NUSSBAUM, *CONCISE HISTORY*, *supra* note 48, at 79; see also BROWNLIE, *supra* note 13, at 11; Draper, *supra* note 48, at 190.

77. 2 ALBERICO GENTILI, *DE IURE BELLI LIBRE TRES* [THE THREE BOOKS ON THE LAW OF WAR] 31-32 (James Brown Scott ed., John C. Rolfe trans., Carnegie Endowment for Int’l Peace 1933) (1612); see RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE* 31 (1999). Gentili also recognized gradations of justice in war: at times, “war is just on one side, but on the other is still more just.” 2 GENTILI, *supra*, at 33. In the context of the post-9/11 preoccupation with preventive (or preemptive) war, animated substantially by the 2002 National Security Strategy and the 2003 invasion of Iraq, which is widely (though incorrectly) believed to have been justified on that basis, it is worth mentioning one reason for Gentili’s belief that a war could be just on both sides: in cases of preventive war, where two sides threatened each other, Gentili believed that each might be justified in striking first. The other could then justifiably respond in defense. I am grateful to David Luban for calling my attention to this point.

78. See Draper, *supra* note 48, at 190.

79. Von Elbe, *supra* note 49, at 677.

80. 2 GROTIUS, *supra* note 2, at 1130; see also *id.* at 1131.

81. E.g., 3 GROTIUS, *supra* note 2, at 1420-21; see also JOHNSON, *supra* note 52, at 178-79; G.I.A.D. Draper, *The Development of International Humanitarian Law*, in *INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW* 67, 67 (1988).

well as combatants who requested quarter, be spared unless found guilty of a crime.<sup>82</sup>

It is in this latter regard that Grotius's strongest contribution to modern IHL emerges. He elaborated the idea of *temperamenta belli*, moderation in war, to which the third book of his treatise is largely devoted. Far more than his predecessors, he stressed humanitarian constraints on war—even if in moral, not strictly legal, terms,<sup>83</sup> for Grotius regarded international law, such as it existed then, as permissive in this respect.<sup>84</sup> Yet by looking to state practice for evidence of natural law, which he found in man's social nature rather than the divine will,<sup>85</sup> he facilitated a critical transition from theological just war theory (expounded mainly by the scholastics) to what would, centuries later, be reformulated as IHL (expounded mainly by international lawyers, statesmen, and secular humanists).<sup>86</sup>

#### 4. *Positivism: Just War as Positive Morality*

Yet if Grotius and Gentili marked the birth of secular just war theory and an early entreaty for the dualistic axiom, their work also reflected the new paradigm of the law of nations, which culminated in its virtually simultaneous demise. Divorced from religious foundations and transposed to a world of states competing for power and influence, just war doctrine rapidly degenerated into what John Austin would deride as "positive morality."<sup>87</sup> The view of Gentili and Grotius—that a war could be just for both belligerents—ironically "brought the just war doctrine in international law to a *cul-de-sac*."<sup>88</sup> For states invariably justified resort to hostilities in just war terms, but no neutral arbiter, even in theory, existed, rendering the doctrine even more manipulable and almost entirely ineffective as restraint on the use of war as tool of statecraft.<sup>89</sup>

Positivism, which gradually displaced natural law as the reigning methodology of international law, therefore explicitly relegated just war doctrine to the domain of ethics rather than law.<sup>90</sup> Hence, in his highly

82. See 3 GROTIUS, *supra* note 2, at 1439-51.

83. NUSSBAUM, CONCISE HISTORY, *supra* note 48, at 106-07. The distinction between the two was not, at the time, anywhere near as sharp as in contemporary legal positivism, however.

84. See Draper, *supra* note 48, at 198.

85. Because Grotius "proceeded on the assumption that the practices of contemporary states were not improper deviations from a theological norm, but expressions of a natural order whose principles he could determine," Friedman, *supra* note 63, at 15, he "claimed in earnest that the law of nature and international law derived therefrom could subsist without a divine foundation." Nussbaum, *Just War*, *supra* note 48, at 466. Furthermore, "by taking a pragmatic, positivistic approach, Grotius could reach both the Catholic princes and the Protestant rulers then engaged in the bitter battles of the Thirty Years War (1618-1648)." Friedman, *supra* note 63, at 15; see also Hedley Bull, *The Importance of Grotius*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS, *supra* note 48, at 65, 78.

86. See Draper, *supra* note 81, at 67-68.

87. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 19-20 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832); see also Nussbaum, *Just War*, *supra* note 48, at 469-71.

88. DINSTEIN, *supra* note 48, at 66-67.

89. See *id.*; see also MYRES S. McDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 134 (1961) ("The absence of an effective central authority enabled each belligerent to be, in effect, his own and final judge . . .").

90. Von Elbe, *supra* note 49, at 682 (quoting EMER DE VATTTEL, THE LAW OF NATIONS 380 (Edward D. Ingram ed., Joseph Chitty trans., 1857) (1758)).

influential treatise *The Law of Nations*, Emer de Vattel begins his analysis of war by stressing “the necessary law of nations, or of the law of nature”<sup>91</sup> and, by reference to it, denouncing unjust wars.<sup>92</sup> But after characterizing natural law as “the inviolable rule that each [nation] ought *conscientiously* to follow,”<sup>93</sup> Vattel explains why, as Nussbaum would later write, just war doctrine “fades entirely as soon as it is severed from its fostering soil, religion”<sup>94</sup>:

But in the contests of nations and sovereigns who live together in a state of nature, how can this rule [that “[h]e alone whom justice and necessity have armed, has a right to make war”] be enforced? They acknowledge no superior. Who then shall be judge between them, to assign to each his rights and obligations—to say to the one, “You have a right to take up arms, to attack your enemy, and subdue him by force,”—and to the other, “Every act of hostility that you commit will be an act of injustice; your victories will be so many murders, your conquests rapines and robberies?”<sup>95</sup>

For this reason, after initially extolling natural law injunctions, Vattel dismissed them and recommended instead a focus on the “voluntary law of nations,” which, he argued, aimed to secure the common advantage of states.<sup>96</sup>

The voluntary law of nations, however, did not prohibit war. Nor, for Vattel, should it, for “warfare which would be illegal on one side and therefore outside the law would create chaotic conditions,” culminating in the opposite of Immanuel Kant’s idealistic vision of perpetual peace,<sup>97</sup> i.e., perpetual war. Any peace, Vattel worried, would be only temporary were postwar reconfigurations of power subject to legal challenge.<sup>98</sup> While Vattel nominally embraced the dualistic axiom,<sup>99</sup> one may question its value or meaning given the virtual absence of constraints on war during this era. In positive international law, war became just another tool of statecraft, to be deployed for any reason or no reason at the sovereign’s discretion.

After World War I, some international lawyers sought to revive just war doctrine as a framework for a reinvigorated law of war. Their efforts failed dismally. By then, Christianity had become an untenable foundation for an aspirationally universal international law, which sought to bind states with diverse religious mores. But except for the residual influence of chivalry, the just war tradition lacked a secular foundation.<sup>100</sup> Given this history, it is curious that when just war theory enjoyed an intellectual revival in the latter half of the twentieth century,<sup>101</sup> theorists treated the dualistic axiom as an entrenched part of that intellectual tradition. In fact, the idea that restraints on

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91. EMER DE VATTEL, *THE LAW OF NATIONS* § 188, at 589 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., 2008) (1758).

92. *See id.* §§ 183-84, at 586.

93. *Id.* § 188, at 589 (emphasis added).

94. Nussbaum, *Just War*, *supra* note 48, at 475.

95. VATTEL, *supra* note 91, § 188, at 589; *see also* Sassòli, *supra* note 11, at 243.

96. VATTEL, *supra* note 91, § 189, at 590.

97. IMMANUEL KANT, *PERPETUAL PEACE* (Lewis White Beck ed., Liberal Arts Press 1957) (1795).

98. Von Elbe, *supra* note 49, at 683; *see* VATTEL, *supra* note 91, § 190, at 591.

99. VATTEL, *supra* note 91, § 191, at 591.

100. Nussbaum, *Just War*, *supra* note 48, at 475; *see also* von Elbe, *supra* note 49, at 687; Kunz, *supra* note 46, at 529.

101. *See* Johnson, *supra* note 57, at 172-80.



the conduct of hostilities should apply equally to all belligerents, whatever their *casus belli*, emerged late in the evolution of just war doctrine and never acquired the axiomatic character that it now enjoys.

## B. Evolution of the Dualistic Axiom in International Law

### 1. War as a Metajuristic Phenomenon

Vitoria, Suárez, Gentili, Grotius, and others of lesser repute integrated just war theory into what would become the public law of Europe and, in time, international law.<sup>102</sup> It would be artificial in this regard to treat the modern law of war as distinct from its theological and natural law roots. Yet the evolution of the dualistic axiom in international law is in a sense the mirror image of its evolution in the just war tradition. Just war theory focused first and foremost on the *jus ad bellum* and only latterly on the *jus in bello*; international law largely abandoned any pretense to a *jus ad bellum* until the advent of the U.N. Charter in 1945 and focused foremost on the *jus in bello*—for “[w]ar being legal and inevitable, no other task was to be performed by States than that of making humanitarian rules regarding the conduct of hostilities.”<sup>103</sup>

This process began in earnest in the nineteenth century. The rise of IHL dates to several milestones in the latter half of that century: when Henri Dunant witnessed the Battle of Solferino (1859) and then founded the International Committee of the Red Cross (ICRC) (1864);<sup>104</sup> when, during the Civil War, Francis Lieber wrote and President Lincoln promulgated the *Instructions for the Government of Armies of the United States in the Field* (1863);<sup>105</sup> and when states drafted the first Geneva Convention (1864) and the St. Petersburg Declaration (1868).<sup>106</sup> These and subsequent developments shaped an early *jus in bello* that viewed war as a “metajuristic phenomenon,” an inevitable if tragic fact of life, “extra-legal rather than illegal.”<sup>107</sup> The idea of just war—insofar as it had ever been understood in legal rather than religious or ethical terms—virtually vanished with the rise of the modern nation-state. The “*liberum jus ad bellum*, the right of the absolute sovereign to

102. Cf. Benedetto Conforti, *The Doctrine of “Just War” and Contemporary International Law*, 2002 ITALIAN Y.B. INT’L L. 3, 5 (describing Vitoria as “half theologian and half lawyer or, better, a kind of bridge between medieval scholars and the founders of the modern science of international law”).

103. *Id.* at 3; see also Arnold D. McNair, *Collective Security*, 17 BRIT. Y.B. INT’L L. 150, 151 (1936) (quoting WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 61 (J.B. Atlay ed., 5th ed. 1904)).

104. See MICHAEL IGNATIEFF, THE WARRIOR’S HONOR: ETHNIC WAR AND THE MODERN CONSCIENCE 109-63 (1998) (tracing the founding and evolution of the ICRC).

105. Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (Apr. 24, 1863) (“Lieber Code”), reprinted in 1 THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 63. The Lieber Code did not purport to be declaratory of international law; it applied only to the Union’s forces during the Civil War. But it inspired comparable codes in Europe and elsewhere. GREEN, *supra* note 50, at 29-30.

106. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, 129 Consol. T.S. 361; Declaration Renouncing the Use in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29-Dec. 11, 1868, 18 Martens Nouveau Recueil (ser. 1) 474, reprinted in 1 AM. J. INT’L L. 95 (Supp. 1907).

107. McNair, *supra* note 103, at 150, 152; see also *id.* at 150-51 (citing jurists such as Brierly, Hall, Westlake, and Oppenheim to the same effect).

initiate war for reasons of state,"<sup>108</sup> displaced the theological *jus ad bellum*. States continued to justify their wars with just war rhetoric.<sup>109</sup> But until the post-World War I era,<sup>110</sup> international law regarded resort to war as a liberty of states, unregulated by law.<sup>111</sup> This liberty, combined with a new humanitarian ethos, supplied a new—and very different—rationale for the equal application of the *jus in bello* to all belligerents than the old theological (empirical) anxiety about the divine will.<sup>112</sup>

The dualistic axiom's emergence in classical international law therefore differs significantly from its evolution in the just war tradition. In short, because international law imposed *no* restraint on resort to war, the *jus in bello* logically could not depend on any *jus ad bellum*: no such body of law existed. That is why treaties codifying the *jus in bello* did not refer to the justice or legality of war, only to mitigating its hardships.<sup>113</sup> To this day, the idea that animates the *jus in bello*, embodied in the ICRC's ethos, is that "human suffering is human suffering, whether incurred in the course of a 'just war' or not. . . . Humanity, not Justice, is its *prime* concern."<sup>114</sup>

## 2. *From Bellum Justum to Bellum Legale*

As late as 1943, international lawyers continued to describe resort to war as "a metajuristic phenomenon, an event outside the range and control of the law."<sup>115</sup> War simply modified "the status of the belligerents, and, to a certain extent, the status of third powers," replacing the law of peace with that of war.<sup>116</sup> Yet two years later, after the most brutal and destructive war in Western history, they sought to subject this metajuristic phenomenon to law—but emphatically not in just war terms. While the advent of the U.N. Charter (which prohibits, with two exceptions,<sup>117</sup> any resort to force<sup>118</sup>) established a new *jus ad bellum*, it did not clarify whether and, if so, how the *jus in bello* would change commensurately.<sup>119</sup> Nothing in the Charter's language speaks to the relationship between the new *jus ad bellum* and the inherited *jus in bello*—

108. Johnson, *supra* note 57, at 170; *see also* von Elbe, *supra* note 49, at 684; Gardam, *supra* note 52, at 396.

109. BROWNIE, *supra* note 13, at 14; DINSTEIN, *supra* note 48, at 67.

110. The League of Nations Covenant contained antecedents to the effort to outlaw war, but the principle received its first authoritative enunciation in the Kellogg-Briand Pact, General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

111. DINSTEIN, *supra* note 48, at 67; *see also* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 114-15 (Bruno Simma et al. eds., 2d ed. 2002). The Hague Convention (III) of 1907 introduced certain formal requirements—for example, that hostilities be preceded by a declaration of war and that neutral powers notified promptly—but did not purport to deny states the absolute right to engage in hostilities as a tool of statecraft. Hague Convention (III) Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, 205 Consol. T.S. 263.

112. DINSTEIN, *supra* note 48, at 156; Greenwood, *supra* note 11, at 225.

113. *E.g.*, Convention Relative to the Treatment of Prisoners of War pmbl., July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343; Hague Convention (IV) Respecting the Laws and Customs of War on Land pmbl., Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277; Hague Convention (II) with Respect to the Laws and Customs of War on Land pmbl., July 29, 1899, 32 Stat. 1803, 187 Consol. T.S. 429.

114. GEOFFREY BEST, HUMANITY IN WARFARE 4-5 (1980).

115. Nussbaum, *Just War*, *supra* note 48, at 477.

116. *Id.*; von Elbe, *supra* note 49, at 684.

117. U.N. Charter arts. 42 (Security Council enforcement), 51 (self-defense).

118. *Id.* art. 2, para. 4.

119. Greenwood, *supra* note 11, at 225.

except, perhaps, insofar as its preamble and scattered references to human rights or dignity elsewhere in the Charter<sup>120</sup> may be read to reinforce the humanitarian ethos of the extant *jus in bello* and so to imply that IHL should remain applicable equally to all belligerents, whatever their *ad bellum* status.

Common Articles 1 and 2 of the Geneva Conventions of 1949 affirmed that the *jus in bello* codified in those treaties *applied* in “all circumstances” and to “all cases of declared war or of any other armed conflict.”<sup>121</sup> But this did not resolve *how* it applied. It did not resolve, for example, the question whether customary principles of military necessity and proportionality—or treaty prohibitions on poison weapons, expanding bullets, and the like—should apply equally were one U.N. member state *illegally* to invade another (in breach of Article 2(4)), and the invaded state *legally* to respond in self-defense (under Article 51). Nor did it resolve whether the *jus in bello* should apply equally to force authorized by the Security Council. It would be at least plausible to say, as some indeed did at that time, that for an aggressor violating Article 2(4) of the Charter, *no* amount of force could be necessary or proportional. These principles require a lawful military objective relative to which they can be applied.<sup>122</sup> Necessary for *what*? Proportional to *what*? If an aggressor lacks the right to use *any* force, then how can a particular quantum of force be lawful?

Protocol I offers another, and the most unequivocal, textual basis for the dualistic axiom. For states parties, at least, the Conventions and “th[e] Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.”<sup>123</sup> Yet Article 1(4) confers *in bello* belligerent rights on some, but not all, nonstate belligerents, namely, peoples “fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.” Many decried this proviso for, in their view, effectively reintroducing into the law the discredited distinction between just and unjust wars.<sup>124</sup> It thereby cast at least some arguable doubt on Protocol I’s otherwise categorical affirmation of the dualistic axiom.<sup>125</sup> Protocol II also confirmed the historical asymmetry between state and nonstate combatants. It retained international law’s traditional prohibition on “private armies”<sup>126</sup> and did not offer combatant

120. See, e.g., U.N. Charter pmb.; *id.* art. 1, para. 3; *id.* art. 55(c).

121. Geneva Convention III, *supra* note 4, arts. 1-2.

122. See MCDUGAL & FELICIANO, *supra* note 89, at 682 (“Clarification of the conception of proportionality requires, at the outset, specification of the base in relation to which the response in reprisal must be proportional.”).

123. See Protocol I, *supra* note 30, pmb.

124. See Antonio Cassese, *The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, 3 UCLA PAC. BASIN L.J. 55, 69 & n.56 (1984); G.I.A.D. Draper, *Wars of National Liberation and War Criminality*, in RESTRAINTS ON WAR, *supra* note 66, at 135, 157-60; Guy B. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT’L L. 109, 124-27 (1986); Sassòli, *supra* note 11, at 255; Abraham Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 901, 913 (1986).

125. See, e.g., NEFF, *supra* note 21, at 374.

126. This rule, which contemporary and classical international law alike embrace, prohibits “the use of force by entities not associated with or operating under delegation from a nation-state.” W.

immunity to those fighting on behalf of nonstate belligerents in internal conflicts.<sup>127</sup>

Yet in modern IHL, the dualistic axiom does not depend on these textual references; it is rather, or so many argue, custom.<sup>128</sup> If it is custom, however, then, like the prohibition on official torture, it may well be custom despite, rather than because of, state practice.<sup>129</sup> It is difficult to appraise any war honestly without recognizing that international lawyers, not to mention belligerents, appraise the conduct of hostilities differently depending on each side's avowed *casus belli*. Participants at different levels of the international legal process express divergent views on the correct application of the *jus in bello*, and those views frequently seem to reflect their perceptions of the legality or justice of particular conflicts.<sup>130</sup>

Lawful or just belligerents, for example, however they may be defined in context, tend to receive more deference in their application of *in bello* proportionality than do unlawful or unjust ones.<sup>131</sup> NATO's aerial war against Serbia may well be a case in point. The decision to fly at a minimum height of 15,000 feet so as to guarantee that NATO would suffer no casualties contributed to the death of about five hundred Serbian civilians and devastated Serbia's infrastructure.<sup>132</sup> Would the ex post appraisal of NATO's decision have differed had its *ad bellum* goal been to conquer and colonize Serbia rather than to halt the incipient ethnic cleansing of Albanian Kosovars? Or consider the 2006 war between Israel and Hezbollah in Lebanon: each side confidently justified its conduct of hostilities and accused the other of proportionality violations—although neither seemed to know whether they meant *ad bellum* or *in bello*.<sup>133</sup> Finally, consider how perceptions of justice, and the stark contrast between good and evil in the Second World War, affected ex post appraisals of Allied carpet bombing of German and Japanese cities, including the fire bombing of Dresden and the atomic destruction of Hiroshima and Nagasaki.

Nevertheless, no state today expresses the view that the justice of its *casus belli* (or the injustice of its opponent's) relieves it of or even relaxes its

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Michael Reisman, *Private Armies in a Global War System: Prologue to Decision*, 14 VA. J. INT'L L. 1, 4 (1973).

127. Protocol II does not authorize private armies, comprised of nonstate combatants, to engage in organized violence. Protocol II, *supra* note 4. In theory their members could be prosecuted for ordinary crimes like murder, as well as war crimes, after the conflict. It states only that after "hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained." *Id.* art. 6, para. 5.

128. BROWNIE, *supra* note 13, at 407 (collecting state practice); see also DINSTEIN, *supra* note 13, at 158-59 (also collecting state practice); Greenwood, *supra* note 11, at 225 (describing the axiom as a longstanding "fundamental tenet" of the *jus in bello* and noting that "the preponderance of state practice and the vast majority of writers continue to support" the axiom); Lauterpacht, *supra* note 11, at 215-20 (collecting judicial decisions).

129. See *Filartiga v. Peña-Irala*, 630 F.2d 876, 884 & n.15 (2d Cir. 1980); see also ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 22 (1994).

130. See Sassöli, *supra* note 11, at 257-58.

131. See Gardam, *supra* note 52, at 392-93, 412. For a detailed analysis of how *ad bellum* perceptions shaped *in bello* conduct in the 1991 Gulf War, see Judith G. Gardam, *Noncombatant Immunity and the Gulf Conflict*, 32 VA. J. INT'L L. 813 (1992).

132. See *infra* notes 290-300 and accompanying text.

133. See *infra* notes 315-327 and accompanying text.

*in bello* obligations. Just as the persistence of official torture in state practice does not necessarily defeat the conclusion that it violates customary international law,<sup>134</sup> so the dualistic axiom may well remain custom despite not infrequent incidents of arguably inconsistent state practice. The critical question is why this custom exists—and how to understand and apply it in an era in which neither theological doubt nor the absence of a *jus ad bellum* supplies its rationale.

### C. The Ad Bellum-In Bello Relationship in the Charter Era

A common but mistaken view of the contemporary relationship between *jus ad bellum* and *jus in bello* is that *ad bellum* judgments precede and operate in a sphere analytically distinct from *in bello* judgments. Once hostilities begin, belligerents cross a kind of legal Rubicon separating the spheres of war and peace: thereafter, “*ius ad bellum* ceases to be relevant and *ius in bello* takes control.”<sup>135</sup> And whatever the *ad bellum* legality of the initial resort to armed force, particular acts must then be judged solely by the *jus in bello*, which applies uniformly to all belligerents. Yet this view, which arguably made sense for so long as no genuine *jus ad bellum* existed, is now anachronistic.<sup>136</sup> Contemporary state practice belies the traditional assumption of a “sharp distinction between peace and war.”<sup>137</sup> In fact, a *sharp* distinction probably never existed; only intermittent and fluctuating levels of conflict did. But given the increase in low-intensity conflicts, civil wars, transnational terrorism, insurgencies, and other organized violence by nonstate belligerents, this observation applies *a fortiori* in the twenty-first century.

The U.N. Charter’s introduction of a positive *jus ad bellum* broke down the formerly distinct legal spheres of war and peace such that *ad bellum* and *in bello* principles now can, and often should, operate concurrently.<sup>138</sup> Any use of force must be necessary and proportional relative to *both* the *jus ad bellum* and the *jus in bello*.<sup>139</sup> The *in bello* concepts of necessity and proportionality have *ad bellum* analogues—with quite distinct meanings. During the 1991 Iraq War, for example, coalition forces sought

to isolate and incapacitate the Iraqi regime. . . . The legitimacy of this objective . . . is a matter for the proportionality equation in *ius ad bellum*. The detailed conduct of the attacks on [particular] targets is a matter for the proportionality equation in IHL, and in the case of the Persian Gulf conflict was worked out frequently on a daily basis. The

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134. *Filaritiga*, 630 F.2d at 884 & n.15; HIGGINS, *supra* note 129, at 20-22; cf. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 838-42 (1997) (arguing that a new form of customary international law, which tends, among other things, to be more attenuated from state practice, has emerged in the postwar era and citing *Filaritiga*’s conclusion that custom prohibits torture as an example).

135. Greenwood, *supra* note 11, at 221; cf. KOTZSCH, *supra* note 11, at 84 (describing the *jus in bello* as “all the rules for which the outbreak of war is the condition *sine qua non*,” which “come into force only when hostilities are in progress”).

136. Greenwood, *supra* note 11, at 221.

137. *Id.* at 221-22 (citing BROWNLIE, *supra* note 13, at 1-129, 384-401).

138. *Id.* at 222-25.

139. See GARDAM, *supra* note 27, at 10-11; HIGGINS, *supra* note 129, at 230-34; Greenwood, *supra* note 11, at 223.

timing and level of command at which the decisions are made in *ius ad bellum* and IHL respectively, therefore, will differ.<sup>140</sup>

Even more generally, the *jus ad bellum* now applies not only to the *initial* decision to resort to force but also to all conduct “involving the use of force which occurs during the course of hostilities.” That conduct must be necessary and proportionate to the *casus belli*.<sup>141</sup>

This proposition need not, as some argue, lead to absurdly or unduly restrictive constraints, for example, “that a state which has been the object of an illegal attack can never take the initiative or that its forces may only fire if fired upon”<sup>142</sup>—although, as we will see below, this position appears to be precisely what the ICJ implied in its *Oil Platforms* judgment.<sup>143</sup> Instead, the proper *referent* of *ad bellum* proportionality changes with the nature and scope of the conflict. Initially, perhaps, defensive force must be *ad bellum* proportionate to the *injury* inflicted. But in any sustained conflict, a state may, and at some stage perforce will, cease to calculate *ad bellum* proportionality by reference to the “*injury received*” and instead consider “*the object legitimately to be achieved*.”<sup>144</sup> *Ad bellum* proportionality generally tries to minimize unauthorized force by requiring states to use no more than necessary for self-defense.<sup>145</sup> But, realistically, in any sustained conflict, the effect of *ad bellum* proportionality as a genuine constraint on force will diminish as the objectives of that force multiply and expand.<sup>146</sup>

Furthermore, “sustained” can no longer be understood to refer solely to prolonged interstate wars. Perhaps the paramount question for the contemporary *jus ad bellum* is under what circumstances an accumulation of discrete attacks by nonstate belligerents operating from a host state—even if no one of these attacks would, in isolation, justify force against that state—may in the aggregate be deemed an “armed attack” under Article 51 of the U.N. Charter, giving rise to a right of self-defense. Suppose, for example, that the United States responded to al-Qaeda’s attack on the *U.S.S. Cole* by invading Afghanistan. Doubtless that would have been an *ad bellum* violation: it would have been *ad bellum* disproportionate to the injury received. But few would deny that the *Cole*’s bombing generated *some* right to engage in proportionate self-defense. In contrast, the invasion of Afghanistan and ouster of the Taliban in response to the far more severe attacks of 9/11, especially in combination with a history of previous strikes by al-Qaeda, were overwhelmingly regarded as lawful despite their formal noncompliance with the positive *jus ad bellum*.<sup>147</sup> Al-Qaeda’s attacks could not be attributed to

140. GARDAM, *supra* note 27, at 21 (footnote omitted).

141. Greenwood, *supra* note 11, at 223.

142. *Id.*

143. See *infra* notes 234–246 and accompanying text; see also Schachter, *supra* note 29, at 315 (noting that “[t]he U.N. Security Council,” too, “in several cases, most involving Israel, has judged proportionality by comparing the response on a quantitative basis to the single attack which preceded it”).

144. HIGGINS, *supra* note 129, at 231.

145. GARDAM, *supra* note 27, at 16.

146. See *id.* at 12.

147. But see Jack Beard, *America’s New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL’Y 559 (2002) (arguing that, even in a formal or positivist sense, the U.S. response complied with the *jus ad bellum* on self-defense).

Afghanistan under the law of state responsibility,<sup>148</sup> and the Taliban did not exercise effective control over al-Qaeda.<sup>149</sup> Still, the Security Council, regional organizations, and many foreign states explicitly supported the U.S. response, strongly implying that they viewed it as lawful.<sup>150</sup> As this example suggests, *ad bellum* proportionality must be appraised contextually.

Yet despite the postwar effort to subject war to law, the *jus ad bellum* remains, as it has been historically, manipulable and often highly politicized.<sup>151</sup> In contrast, the *jus in bello*, including *in bello* proportionality, strives to remain agnostic about the architectural goals of war. It insists that each strike be proportionate in that it not inflict excessive civilian harm relative to the *concrete* military advantage sought by the *particular* attack.<sup>152</sup> Of course, this is easy to state abstractly but notoriously difficult to apply.<sup>153</sup> IHL, as explored below, urgently needs to develop the concrete details of *in bello* proportionality. The point of emphasis here is that, today, in contrast to the prewar era, both the *jus ad bellum* and the *jus in bello* apply concurrently throughout an armed conflict—and this creates circumstances rife with the potential for conflation of these distinct bodies of law.

### III. THE SOURCES AND LOGIC OF CONFLATION

The concurrent operation of the *jus ad bellum* and *jus in bello* can lead to at least three forms of *ad bellum-in bello* conflation, which may initially appear logical: (1) an aggressor-defender model of war, which denies the dualistic axiom by reference to the maxim *ex injuria jus non oritur* (a right may not arise from an illegal act); (2) allowing *ad bellum* proportionality to influence its *in bello* analogue; and (3) vitiating the dualistic axiom in circumstances of perceived national crisis—what the literature denotes “supreme emergency.”<sup>154</sup> Despite international law’s embrace of the dualistic

148. See *Draft Articles on Responsibility of States for Internationally Wrongful Acts* arts. 8-9, 11, in *Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 Y.B. Int’l L. Comm’n 20, 47-49, 52-54, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Pt 2); *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 117-25 (June 27).

149. *Nicaragua*, 1986 I.C.J. at 125.

150. See S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001); Press Release, N. Atl. Council, Statement by the North Atlantic Council (Sept. 12, 2001), <http://www.nato.int/docu/pr/2001/p01-124e.htm>; Org. of Am. States [OAS], *Terrorist Threat to the Americas*, O.A.S. Res. RC.24/RES.1/01 (Sept. 21, 2001), <http://www.oas.org/OASpage/crisis/RC.24e.htm>.

151. To take a recent example—did Russian troops enter Georgia, as Russia says, to protect the people of South Ossetia from atrocities perpetrated by the Georgian military in its effort to retake that province or, as Georgia says, to annex the pro-Russian breakaway provinces of South Ossetia and Abkhazia? Compare, e.g., Mikhail Gorbachev, *Russia Never Wanted a War*, N.Y. TIMES, Aug. 19, 2008, at A20, with *Russia’s War of Ambition*, N.Y. TIMES, Aug. 12, 2008, at A20. See also Anne Barnard, *Russia Broadens Military Campaign as All-Out War Threatens Georgia*, N.Y. TIMES, Aug. 9, 2008, at A1; Nicholas D. Kristof, *Obama, Misha and the Bear*, N.Y. TIMES, Nov. 20, 2008, at A43.

152. See, e.g., Protocol I, *supra* note 30, art. 51(5)(b) (emphasis added); cf. Rome Statute of the International Criminal Court art. 8(2)(a)(iv), adopted July 17, 1998, 2187 U.N.T.S. 93 (July 1, 2002) [hereinafter Rome Statute].

153. See, e.g., William J. Fenwick, *Attacking the Enemy Civilian as a Punishable Offense*, 7 DUKE J. COMP. & INT’L L. 539, 545-46 (1997).

154. E.g., WALZER, *supra* note 1, at 251-68; MICHAEL WALZER, *Emergency Ethics*, in ARGUING ABOUT WAR, *supra* note 18, at 33.

axiom, these forms of conflation challenge its vitality at an abstract level—with concrete consequences for IHL's capacity to protect human rights and reduce superfluous suffering in war. This Section explicates the logic of conflation; I defer to the next examples of how this logic affects the law and practice of war.

### A. *The Aggressor-Defender Model*

Before the U.N. Charter regime, the dualistic axiom rested on two rationales, one theological, the other legal. First, in just war theory, anxiety about the opaque will of the Christian God led theologians to advocate moderation in war by all belligerents, for it would often be impossible to know which fought in the service of divine justice, a doctrine known generally as “probabilism.” Second, in classical international law, the absence of a *jus ad bellum* rendered the idea of conditioning the application of the *jus in bello* on the former's observance incoherent. In an era when resort to war could not meaningfully be characterized as lawful or unlawful, it made no sense to condition the application of the rules governing the conduct of war on such a characterization. One reason for conflation in the contemporary law of war is that neither of these rationales remains, strictly speaking, applicable.

First, modern just war theorists either repudiate theology as the basis for their views or embrace a more expansive conception of the *jus in bello*—for it is, of course, no longer tenable for theologians to argue that just combatants may kill heathens without restraint because the former fight in the service of God.<sup>155</sup> Indeed, that view would be indistinguishable in principle from the justifications for sacred terrorism espoused by terrorist networks like al-Qaeda.<sup>156</sup> Second, in international law, the postwar introduction of a *jus ad bellum* begs the question why aggressors should continue to benefit from the *jus in bello*. The general principle of law *ex injuria jus non oritur* holds that rights cannot arise from illegal acts. On this view, a war initiated in violation of the Charter's *jus ad bellum* should give rise to no *in bello* rights.

A study by the *Institut de droit international* undertaken shortly after the Charter's introduction, which reflects a strain of thought not uncommon at that time, indeed concluded “that ‘there cannot be complete equality’ in the operation of the rules of warfare when the competent organ of the United Nations determines that one of the belligerents has resorted to armed force unlawfully.”<sup>157</sup> To some, that is, the Charter had in effect restored the medieval primacy of the *jus ad bellum* and rendered the *jus in bello* dependent

155. Contemporary Christian just war theorists tend to conceptualize the doctrine in terms of natural law rather than, strictly, theology. O'BRIEN, *supra* note 46, at 15. Secular just war theorists tend to argue in terms of normative ethics. Walzer's *Just and Unjust Wars*, for example, the *locus classicus* of modern just war theory, describes itself as a work of “practical morality” and deliberately avoids ethical foundations. WALZER, *supra* note 1, at xxiii.

156. See, e.g., OSAMA BIN LADEN, MESSAGES TO THE WORLD: THE STATEMENTS OF OSAMA BIN LADEN 61 (Bruce Lawrence ed., James Howarth trans., 2005); Michael Moss & Souad Mekhennet, *The Guidebook For Taking A Life*, N.Y. TIMES, June 10, 2007, § 4, at 1.

157. DINSTEIN, *supra* note 48, at 159 (quoting Resolution, *Equality of Application of the Rules of the Law of War to Parties to an Armed Conflict*, 50(II) ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 376 (1963)).



on the legality of the initial resort to force.<sup>158</sup> From this perspective, henceforth

the accepted rules of war [would] operate only at the option of the States resisting aggression; . . . such States may modify them at will; and . . . the aggressor State or States cannot derive from their initial illegality any legal rights, including the rights usually associated with the conduct of war.<sup>159</sup>

Others did not draw this radical conclusion but thought it would be injudicious for international law to focus on the *jus in bello*. They feared that its elaboration would interfere with the postwar aspiration to prohibit war altogether by implicitly legitimizing wars fought in conformity with IHL.<sup>160</sup> These fears yielded an aggressor-defender model of war that persists in the *jus in bello* to a degree seldom recognized.

This model, which denies the dualistic axiom and instead affords the perceived defender more leeway in its application of the *jus in bello* than it does the perceived aggressor, is not strictly *illogical* given the Charter; it is, experience attests, simply unrealistic. Lauterpacht argued in an early piece, which retains its force today, that despite the Charter's formal terms, "we must visualize at least three sets of situations" involving force: (1) where the Security Council resolves that one state is the aggressor and authorizes collective security measures; (2) where the Council does not or, because of institutional paralysis, cannot determine the aggressor by a formal resolution but, nonetheless, an "overwhelming consensus" among states exists "as to who in fact is the aggressor"; and (3)

where there has been no collective determination of aggression in any shape or form, but where there is a conviction on the part of some States that one belligerent party is the aggressor and that it is waging an illegal war. That conviction may be held by both belligerent sides, mutually charging one another with being guilty of aggression. States outside the conflict may be equally so divided in their assessment of the legal merits of the struggle.<sup>161</sup>

The Charter's drafters clearly hoped that the first situation would become the norm. As early as 1953, however, it had become clear that the latter two situations had to "be regarded as typical, and that any discussion of the effects of the illegality of the war as it results from the first possibility partakes of a distinct measure of unreality."<sup>162</sup> Absent an authoritative decision on force's legality, which an institutionally paralyzed Security Council could seldom provide, each belligerent would inevitably justify force by reference to the Charter, typically as self-defense under Article 51—just as, in earlier times, each would inevitably, if disingenuously, claim the mantle of justice for itself and deny it to the other. Little had changed since theologians and early international lawyers struggled with the will-of-God paradox: that

158. BROWNIE, *supra* note 13, at 406 & n.1 (collecting sources).

159. Lauterpacht, *supra* note 11, at 206; see also *id.* at 210.

160. See *Report of the International Law Commission to the General Assembly*, 4 U.N. GAOR Supp. (No. 10) at 1, U.N. Doc. A/925 (1949), reprinted in [1949] 1 Y.B. Int'l L. Comm'n 281, ¶ 18, U.N. Doc. A/CN.4/13/1949; see also FRITS KALSHOVEN, *CONSTRAINTS ON THE WAGING OF WAR* 18 (1987).

161. Lauterpacht, *supra* note 11, at 207.

162. *Id.* at 207.

although it may be absurd to think that a war can be just on both sides in the sight of God, it will seldom be possible to ascertain on which side divine justice lies. And so "the plea of self-defence will be invoked alike by the guilty belligerent and by his victim."<sup>163</sup>

In short, the U.N. Charter enacted a regime in which it would be plausible to distinguish the *jus in bello* applicable to the aggressor from that applicable to the defender. In this view, an aggressive war initiated in violation of the Charter "should no longer confer upon the guilty belligerent all the rights to which he was entitled under traditional international law."<sup>164</sup> But because international law is a defective legal system, especially insofar as it tries to regulate resort to force, in practice,

any application to the actual conduct of war of the principle *ex injuria jus non oritur* would transform the contest into a struggle which may be subject to no regulation at all. The result would be the abandonment of most rules of warfare, including those which are of a humanitarian character. . . . [T]hey would in fact cease to operate if their operation were made dependent upon the legality of the war on the part of one belligerent or group of belligerents.<sup>165</sup>

Lauterpacht's argument became received wisdom.<sup>166</sup> Largely for the reasons he advanced, the dualistic axiom finds ample support in modern treaties, military manuals, and judicial decisions applying the law of war.<sup>167</sup> Yet despite this theoretical consensus, the aggressor-defender model persists in practice to a degree not fully appreciated. As Lauterpacht predicted, it degrades the efficacy of the law.

### B. *Proportionality*

A second form of conflation involves confusion of *ad bellum* and *in bello* proportionality. Suppose that Aggressor (*A*) attacks Victim (*V*). Perhaps *A* claims to be defending himself or another. But that claim is manifestly wrong or unreasonable—even pretextual. *A*'s resort to force is therefore objectively illegal. Under the circumstances, *no* force may lawfully be used by *A* against *V*. How then can *some* force still be proportional? Several contemporary political theorists offer essentially this syllogism to challenge the dualistic axiom. McMahan, for example, argues that unjust combatants—that is, soldiers fighting an unjust war—cannot comply with the *jus in bello* because except where they "prevent wrongful acts by just combatants, their acts of war cannot satisfy the proportionality requirement, and satisfaction of this requirement is a necessary condition of permissible conduct in war."<sup>168</sup>

This argument, while not theoretically unassailable,<sup>169</sup> cannot be casually dismissed. It makes intuitive sense to say that the amount of tolerable

163. *Id.* at 220.

164. *Id.* at 212.

165. *Id.*

166. See BROWNIE, *supra* note 13, at 406 n.3 (collecting authorities).

167. *Id.* at 407 & nn.2-7.

168. McMahan, *Ethics of Killing*, *supra* note 17, at 714; see also *id.* at 708; Hurka, *supra* note 14, at 44.

169. E.g., Benbaji, *supra* note 43.

collateral damage should be greater, for example, “in a war against a genocidal enemy such as Nazi Germany . . . than in the Falklands War.”<sup>170</sup> But from a legal perspective, the argument’s real defect lies in its collapse of proportionality’s distinct *ad bellum* and *in bello* components. The assertion that an unjust war cannot be fought justly, without violating *in bello* proportionality, depends on the view that *in bello* proportionality calls for a balance between, on the one hand, the *in bello* harms caused by force and, on the other, the ultimate *ad bellum* goods to which that force purportedly contributes. If those goods, by hypothesis, are objectively *not* good (or unjust), then of course no force in an unjust war can be, *in this particular sense*, proportional: the proportionality dice, so to speak, have been loaded from the outset. And because proportionality is an essential part of the *in bello* “rules,” it is equally clear, from this perspective, that the dualistic axiom’s strict analytic distinction between *jus ad bellum* and *jus in bello* is a fiction.<sup>171</sup> Not coincidentally, this argument is strongly reminiscent of the scholastic opinion that it would be absurd to suppose that a war can be just on both sides in the sight of God.<sup>172</sup>

To their great credit, McMahan and Hurka alike stress that the “deep morality” of war must not be confused with an account of the law of war.<sup>173</sup> Yet because morality influences law,<sup>174</sup> it is important to clarify why the foregoing syllogism is misguided in law, even were it correct in ethical theory—a matter on which I share others’ doubts. Many disagree, in particular, with the view that the *ad bellum* injustice of a *state*’s decision to use force automatically transfers to its individual soldiers, rendering them individually morally responsible, and indeed criminally liable, for participating in organized violence on behalf of the political elites for whom they fight.<sup>175</sup> Furthermore, it should never be forgotten—despite the proliferation and general celebration of international criminal law in the post-Cold War era as one technique to enforce or vindicate IHL—that the main purpose of the *jus in bello* is not to ascribe moral blame or criminal liability; it is to protect human dignity and rights and to avert superfluous suffering to the greatest extent possible in war.

By replacing *bellum justum* with *bellum legale*,<sup>176</sup> postwar international lawyers sought to unshackle the *jus in bello* from its historic dependence on

170. Hurka, *supra* note 14, at 44.

171. *Id.* at 44–45.

172. SUÁREZ, *supra* note 75, at 815–16.

173. McMahan, *Ethics of Killing*, *supra* note 17, at 730; cf. Hurka, *supra* note 14, at 45.

174. See McMahan, *Ethics of Killing*, *supra* note 17, at 731–32 (quoting WALZER, *supra* note 1, at 133 (“The war convention must first be morally plausible . . . ; it must correspond to our sense of what is right.”)); see also WALZER, *supra* note 1, at xxii (“Since positive international law is radically incomplete, it is always possible to interpret it in the light of moral principles and to refer to the results as ‘positive law.’”).

175. Although I agree with the traditional view, against which McMahan, Hurka, and others argue, I do not mean to dismiss cavalierly their forceful and philosophically sophisticated arguments against the view that individual soldiers should be exonerated because “of the coercive pressures and the constraints on knowledge that often apply to those whose government orders them to fight.” McMahan, *Ethics of Killing*, *supra* note 17, at 700; see also *id.* at 700–08; McMahan, *Moral Equality*, *supra* note 17, at 383–91; cf. DAVID RODIN, *WAR AND SELF-DEFENSE* 165–73 (2002). I do not, however, want to digress into that ethical debate here.

176. Kunz, *supra* note 46, at 529–32.

the *jus ad bellum*, which had been discredited for centuries before the advent of the U.N. Charter—not least because the *jus ad bellum* had proved so susceptible to self-serving characterizations and abuse. That is why it is legally incorrect to say that military advantage may only justify collateral damage if it contributes to an objectively good result.<sup>177</sup> Postwar IHL instead recognizes that even if an unjust (or illegal) belligerent's military advantage would objectively be an *evil*, *in bello* proportionality nonetheless must legally *consider it as if* it were a good. Otherwise, *in bello* proportionality would often be rendered meaningless by each belligerent's self-serving *ad bellum* judgment.<sup>178</sup> *In bello* proportionality, according to the syllogism set out above, would invariably yield the conclusion that unjust or illegal belligerents may never inflict collateral damage. In fact, by the same logic, unjust belligerents may never even kill and injure combatants with impunity, the most significant belligerent right conferred by the *jus in bello*. That, too, from a moral standpoint, may well be an evil, depending on the ultimate *ad bellum* objective of the conflict. Again, however, postwar IHL recognizes that the *jus in bello* would largely cease to function if self-serving judgments of this sort were allowed to relieve belligerents of IHL obligations.

Whatever the force of the foregoing just war argument as a matter of ethics, it is therefore a mistake, as a matter of law, to understand *in bello* proportionality to require combatants to weigh *in bello* harms (for example, death, suffering, or property destruction) against architectural *ad bellum* goods (for example, self-defense, territorial conquest, or humanitarian intervention)—that is, against the ultimate *casus belli* advanced to justify force.<sup>179</sup> In IHL, *in bello* proportionality instead deliberately tries to specify a conception of military necessity that is conceptually removed from *ad bellum* judgments about the legality or justice of the ultimate objectives of force.<sup>180</sup> The answer to the question “*in bello* proportional to what?” is therefore not the (just or unjust, legal or illegal) *casus belli*. Nor is it “the end [of victory].”<sup>181</sup> Precisely because this good, if it is a good, will seldom be free from doubt (even for soldiers fighting in good faith), *in bello* proportionality instructs them to weigh the “concrete and direct military advantage anticipated,”<sup>182</sup> not the abstract *casus belli*, against the foreseeable harm to civilians.

McMahan regards this view as plausible but says it trivializes *in bello* proportionality's moral dimension: “so understood,” he writes, “proportionality is not a genuine moral requirement but merely a device that

177. Hurka, *supra* note 14, at 45.

178. Sassòli, *supra* note 11, at 246.

179. See McMahan, *Ethics of Killing*, *supra* note 17, at 713.

180. See WALZER, *supra* note 1, at 129. McMahan argues that “one cannot weigh the bad effects that one would cause against the contribution one's act would make to the end of victory without having some sense of what the good effects of victory would be”; and “[i]f one's cause is unjust, [for example, the Nazi desire to create a supreme Aryan nation,] the value of the event—victory—would presumably be negative, not positive.” McMahan, *Ethics of Killing*, *supra* note 17, at 715. That is right. But, again, it is not an appropriate characterization of IHL's *in bello* proportionality calculus, even if it has force as a matter of normative ethics.

181. WALZER, *supra* note 1, at 129 (quoting HENRY SIDGWICK, *THE ELEMENTS OF POLITICS* 254 (London, Macmillan 1891)).

182. Protocol I, *supra* note 30, art. 51(5)(b) (emphasis added).

serves the moral purpose of limiting the violence of those who ought not to be engaged in warfare at all.”<sup>183</sup> But unless one takes for granted a purely deontological account of what it means for a requirement to be genuinely moral, it is unclear why this view of *in bello* proportionality trivializes its moral dimension. In law, at any rate, IHL does not adopt one moral perspective from among the predominant schools, i.e., either deontology or teleology. Indeed, IHL’s norms cannot be reconciled with a univocal moral theory.<sup>184</sup> They manifest a moral eclecticism comprised of (both act and rule) utilitarianism;<sup>185</sup> deontological insistence on the inalienability of certain rights;<sup>186</sup> and even a residuum of virtue ethics, especially if we appreciate that enforcement dynamics (compliance as well as coercion) themselves constitute a critical part of law.<sup>187</sup> Consider two examples:

First, Common Article 3 of the Geneva Conventions, which applies in all cases “of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties,” prohibits, as to “[p]ersons taking no active part in the hostilities,” certain acts, including extrajudicial killing and torture, “at any time and in any place whatsoever.”<sup>188</sup> This rule, which has been recognized as custom,<sup>189</sup> is part of the *jus in bello*. It admits of no exception, even though it is easy to envision circumstances in which utility (however defined) would be better served by its violation.

Second, Protocol I prohibits “indiscriminate attacks.”<sup>190</sup> That prohibition takes an absolute form insofar as civilians may never, whatever the utility, “be the *object* of attack.”<sup>191</sup> But it otherwise takes a qualified form. It prescribes a flexible calculus by describing as indiscriminate those attacks that “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>192</sup>

In IHL, “the concrete and direct military advantage anticipated” should never be confused with, or allowed to collapse back into, the ultimate *casus belli* of a party. By specifying the relevant yardstick at a lower level of abstraction—one tied to the facts on the ground—IHL tries to remove calculations of *in bello* proportionality from ultimate military objectives and

183. McMahan, *Ethics of Killing*, *supra* note 17, at 716.

184. See WALZER, *supra* note 1, at 130.

185. Act utilitarianism alone, as Walzer notes, fails to account for the *jus in bello*: because wars recur, the effect of any IHL rule must be considered along a broader time horizon. See WALZER, *supra* note 1, at 131 & n.

186. See W. Michael Reisman, *Holding the Center of the Law of Armed Conflict*, 100 AM. J. INT’L L. 852, 852 (2006).

187. See IGNATIEFF, *supra* note 104, at 109-63.

188. Geneva Convention III, *supra* note 4, art. 3; see also Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 2, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]; Hamdan v. Rumsfeld, 548 U.S. 557, 628-33 (2006); INT’L COMM. OF THE RED CROSS & RED CRESCENT, STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3 (2007), available at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/customary-law-30-international-conference-121007>.

189. See Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 69 (Oct. 2, 1995).

190. Protocol I, *supra* note 30, art. 51(4).

191. *Id.* art. 51(2) (emphasis added).

192. *Id.* art. 51(5)(b).

oft-politicized *ad bellum* judgments. It tries, that is, to halt the slippery slope from “concrete and direct military advantage” to “victory.” In law, even if not in the deep morality of war,<sup>193</sup> it is therefore incorrect to regard *ad bellum* judgments as necessarily determinative of *in bello* proportionality judgments—still less as relevant to *in bello* duties of an absolute nature, for example, those that prohibit torture, extrajudicial killing, or denial of quarter. Again, however, this form of conflation afflicts some recent state practice and jurisprudence. *Ad bellum* proportionality, contrary to the dualistic axiom, at times influences *in bello* proportionality.<sup>194</sup>

### C. “Supreme Emergency”: Threshold Deontology in IHL?

The final variant of the logic of conflation that threatens the dualistic axiom is the concept of “supreme emergency.” Winston Churchill used this phrase to describe Britain’s predicament in the early days of the Second World War, when it seemed the Nazis would prevail. Walzer then coined it in *Just and Unjust Wars* to refer to a threat to national survival dire enough to warrant overriding otherwise absolute *in bello* constraints, including, for example, the prohibition on intentionally targeting civilians—and presumably, therefore, also tactics like terrorism, torture, and carpet bombing.<sup>195</sup> At first glance, the idea seems straightforward: if the *ad bellum* stakes become high enough, *in bello* constraints may be overridden. It thus involves, as theorists recognize, an explicit denial of the dualistic axiom.<sup>196</sup>

The doctrine of supreme emergency bears a family resemblance to the moral theory known as threshold deontology.<sup>197</sup> Walzer, at least, seems to understand it this way.<sup>198</sup> Threshold deontology holds that people have rights, which ordinarily must be respected without regard for the consequences, but that if the bad consequences of respecting those rights become *exceptionally bad* (precisely how bad is unclear and may vary), then those rights may be temporarily overridden. Put otherwise, it insists on deontological rights up to a particular threshold, but says it is morally permissible, perhaps even mandatory, to treat those rights in a utilitarian fashion in extremely dire circumstances.<sup>199</sup> As a generic thesis, threshold deontology has been

193. McMahan, *Ethics of Killing*, *supra* note 17, at 730.

194. See Gardam, *supra* note 52, at 412; see also CHRISTIAN WICKER, *THE CONCEPTS OF PROPORTIONALITY AND STATE CRIMES IN INTERNATIONAL LAW* 30-32 (2006).

195. See WALZER, *supra* note 1, at 251-68; see also WALZER, *supra* note 154, at 33-34; MICHAEL WALZER, *Terrorism: A Critique of Excuses*, in *ARGUING ABOUT WAR*, *supra* note 18, at 51, 51-66.

196. WALZER, *supra* note 1, at 265.

197. See Larry Alexander, *Deontology at the Threshold*, 37 SAN DIEGO L. REV. 893 (2000); see also CHARLES FRIED, *RIGHT AND WRONG* 10 (1978); MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 158 (1997).

198. Walzer says that “[w]hen our deepest values are radically at risk, the constraints lose their grip, and a certain kind of utilitarianism reimposes itself.” WALZER, *supra* note 154, at 40; see also WALZER, *supra* note 1, at 251-55.

199. This is admittedly somewhat of a caricature; it is for illustrative purposes only. It may well be coherent to hold that rights (depending on their definition) merit a great deal of moral weight and take precedence over ordinary public policy matters and considerations of utility, but that they may—or must—be overridden by *very substantial* considerations of utility. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 184 (1977). In a philosophical context, we would also want to distinguish carefully,

powerfully criticized. The question here is whether it captures the logic of supreme emergency as manifest in IHL. It is unclear that it does.

In particular, as Daniel Statman recently argued, supreme emergency theory may not be a variant of threshold deontology at all, because it relies on an ideological preference for the members of the *polity*—typically, the state—that asserts a right to engage in otherwise prohibited uses of force that violate the *jus in bello*: nuclear attacks, carpet bombing, torture, and so forth.<sup>200</sup> That may be why Walzer and like-minded theorists concede that even terrorism *could*, not *would*, be justified (or excused?) in a supreme emergency.<sup>201</sup> It depends on the nature of the polity. Ordinarily prohibited tactics of war become permissible, for many supreme emergency theorists, only if they are the exclusive way to prevent an untenable catastrophe to a *polity* of some kind.

To quote the ICJ's *Nuclear Weapons* opinion (to which I will return below, for it arguably relied on supreme emergency theory to answer a critical international legal question), nuclear weapons may *perhaps* be used "in an extreme circumstance of self-defence, in which the very survival of a *State* would be at stake."<sup>202</sup> Supreme emergency doctrine, as manifest in this quotation, seems to assume that states, *as* states, have an independent value, which exceeds the aggregate interests of their constituents. In short, to oversimplify, it assumes that the whole is greater than the sum of its parts. This particular vision of politics originates in Rousseau's conception of the general will of a society, which has an "associative" value that exceeds the "aggregative" value constituted by the sum of the interests of society's members.<sup>203</sup> That is why the survival of "a *State*" with, suppose, twenty million citizens might justify a nuclear strike even if that strike kills forty million or more others.

Supreme emergency theory in IHL may therefore not be best conceived as a form of threshold deontology, a theory that ordinarily presupposes a utilitarian framework that counts people equally. In fact, the thesis "that collectives have a right to kill the innocent if it is the only way to protect themselves from enslavement and massacre" often proves inconsistent with utilitarianism because the latter posits that "collectives are allowed to give priority to their own lives over the lives of others, only after it has been demonstrated that such preference will lead to better results overall."<sup>204</sup> Yet how can the death of an extra twenty million people be a better result unless we ascribe a robust, independent moral value to the *association* of the surviving twenty million *as* a state? Supreme emergency theory, as manifest in the ICJ's opinion, apparently prioritizes the survival of abstractions, i.e., states, over the happiness, preference, well-being, or other utilitarian unit of

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as Hohfeld famously did, between the kinds of rights at stake. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

200. See Daniel Statman, *Supreme Emergencies Revisited*, 117 ETHICS 58 (2006).

201. WALZER, *supra* note 195, at 54; see also C.A.J. Coady, *Terrorism, Morality and Supreme Emergencies*, 114 ETHICS 772 (2004).

202. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 266 (July 8) (emphasis added).

203. ROUSSEAU, *supra* note 34, at 147-49.

204. Statman, *supra* note 200, at 60.

value relevant to concrete human beings. It seems, that is, to invest states *as such* with a questionable moral status.

I say "questionable" because this status is redolent of the position states held in classical, prewar international law, which regarded the state as its fundamental subject. In contrast, contemporary, postwar international law, *especially* as it relates to the initiation and conduct of hostilities, regards people, not states, as its fundamental subject and unit of value. The introduction of international human rights law in the postwar era shifted the fulcrum of the international legal system from the protection of the interests of states—which, in practice, generally meant the interests of their political elites—to the protection of human beings.<sup>205</sup> This need not entail that no value may be ascribed to states based on their associative value as political communities, but it does entail that, in the final analysis, "any rights states have must derive from and concern the rights of their citizens."<sup>206</sup> A state's value, qua state, is contingent on the extent to which it represents a normatively desirable polity,<sup>207</sup> and that will vary. Why, after all, should the survival of an autocratic regime like North Korea, which starves and otherwise abuses its own citizens (or, for that matter, of Nazi Germany) justify the use by that state of otherwise prohibited *in bello* tactics that cause unconscionable human suffering?

In fact, then, supreme emergency theory emerges in this context not as a variant of threshold deontology in IHL. Rather, it seems to be an assertion about the law of "*self-defence* if an armed attack occurs against a Member [State] of the United Nations."<sup>208</sup> The law of self-defense is part of the *jus ad bellum*, not the *jus in bello*. That is why supreme emergency theory can lead to the conflation of these distinct bodies of the law: it confuses the (arguable) *ad bellum* self-defense rights of certain states under the law of the U.N. Charter and its progeny with the *in bello* rights of *individuals*. The danger of this doctrine quickly becomes apparent if we recognize that it admits of no limit. The ICJ did not rest its decision in this regard on anything unique about nuclear weapons, or about the nature of the state whose survival might be at stake. Its logic could equally vindicate *any* prohibited *in bello* tactic (torture, terrorism, biological or chemical weapons, etc.),<sup>209</sup> in defense of *any* polity. To concede that such tactics may be lawful under exigent circumstances is a serious cost of conflation.

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205. LOUIS HENKIN, *THE AGE OF RIGHTS* 2-10 (1990); Luban, *Just War and Human Rights*, *supra* note 35, at 208-11; Reisman, *supra* note 40, at 872.

206. Hurka, *supra* note 14, at 51; accord WALZER, *supra* note 1, at 53-55.

207. Even Walzer, who defends a more robust moral standing for states, agrees. WALZER, *supra* note 1, at 54 ("The moral standing of any particular state depends upon the reality of the common life it protects . . . . If no common life exists . . . its own defense may have no moral justification."); see also Richard Wasserstrom, 92 HARV. L. REV. 536, 540 (1978) (reviewing MICHAEL WALZER, *JUST AND UNJUST WARS* (1977)) (contending that Walzer's defense of the rights of states becomes increasingly disconnected from its original foundation in individual rights as the argument proceeds). But see Walzer, *supra* note 34 (replying to, among others, Wasserstrom on this point).

208. U.N. Charter art. 51 (emphasis added).

209. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 266 (July 8). For further analysis, see *infra* notes 276-285 and accompanying text.



## IV. THE COST OF CONFLATION

After each of the twentieth-century world wars, postwar architects—with memories of war fresh in their minds—expected that states would be prepared to forswear, or at least dramatically limit, resort to war, and by focusing principally on the *jus ad bellum*, relegated the *jus in bello* to secondary importance.<sup>210</sup> Post-World War I international lawyers sought to revive just war theory; post-World War II international lawyers worried that the elaboration of IHL would undermine their effort to ban war altogether. In part for this reason, our understanding of *ad bellum* and *in bello* proportionality, and their relation to the Charter's general prohibition on force, is impoverished. The following Sections use the vehicle of ICJ jurisprudence and the evidence of recent state practice to suggest how and in what respects.

Before proceeding, however, I must clarify several methodological points that I presuppose and that necessarily qualify the following analysis; it would require too much of a digression to defend them here. First, it is often (but not always) misguided to accept what the ICJ says as a reflection of what the law presently is. Too many international lawyers tend to treat ICJ decisions as though they were authoritative pronouncements from upon high by an international court of last resort like the Supreme Court of the United States. That is false as a matter of positive law: the ICJ's decisions have no binding force except relative to the parties to particular disputes<sup>211</sup> and no formal precedential value,<sup>212</sup> even though the Court and others often treat its decisions as highly persuasive and even precedential. Yet in part for that very reason, its decisions do matter: they send signals of varying strength to different participants in the international legal process. The authority of these signals depends on the nature of the recipient.

Second, the ICJ's Statute textually limits the *sources* the Court may apply to international disputes brought before it by *state* consent.<sup>213</sup> The italicized words indicate two further qualifications: (1) because the ICJ Statute limits the methodological lenses through which the ICJ analyzes disputes to the positive sources enumerated in Article 38(1), it may be unsurprising—and even jurisprudentially appropriate—that the Court sometimes marginalizes or disregards sociopolitical dynamics that seem to influence the *jus ad bellum*, the *jus in bello*, or their relationship; and (2) because states constitute only *one* of the authors of force that international law strives to regulate today (others include insurgents, terrorists, paramilitaries, transnational criminal syndicates, militias, and so on), the capacity of the ICJ to pronounce on the contemporary law of war is limited. Again, that does not make its decisions irrelevant. Few other international institutions speak to major *ad bellum* issues in the law of war with at least theoretical judicial impartiality.

210. See FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR 24-25 (3d ed. 2001).

211. Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, U.N. Charter app.

212. See *id.*

213. *Id.* art. 38(1).

Finally, international law, particularly insofar as it strives to regulate the initiation and conduct of armed hostilities, is a defective normative system. That is one reason why so many arguments that international law is not really law focus on its capacity to regulate war. But even in war, law is a variable in the complex of factors that influences how states and other authors of collective violence act (although the ICJ's decisions reflect only one variable of that variable). It would be as much a mistake to trivialize the role of international law as to overstate it.<sup>214</sup> If war lies at the vanishing point of international law, itself the "vanishing point of law,"<sup>215</sup> still, international law—because of, among other compliance dynamics, perceptions of legitimacy and authority, reputation, reciprocity, habit, and the self-conception of political actors—can influence how participants in war behave.<sup>216</sup> Conversely, insofar as the law fails to recognize, or to offer realistic guidance in view of, technological, geopolitical, and other changes in modern warfare, the force of its norms will diminish commensurately. In the next Section, I critique some of the ICJ's jurisprudence and construction of the Charter from this general methodological perspective. To be clear, I do not argue that each and every judgment below evinces conflation so much as that the *ad bellum* framework established and inflexibly preserved by the Court's jurisprudence in this area contributes to it.

## A. *Conflation and the ICJ's Jurisprudence of War*

### I. Corfu Channel

Perhaps because the Charter's drafters envisioned self-defense only as a failsafe in the event of an actual armed attack, in circumstances where immediate collective action would not be feasible,<sup>217</sup> the ICJ has repeatedly construed Article 51 restrictively—more so than its ordinary meaning suggests.<sup>218</sup> The ICJ's consistent policy, despite vast changes in the nature of war since 1945, has been to minimize the contingencies for transborder

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214. See, e.g., Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544 (1971).

215. Lauterpacht, *supra* note 11, at 381-82.

216. See, e.g., HENKIN, *supra* note 39, at 92-98. In general, I presuppose that the efficacy of any norm of international law is a function of its variation along three communicative dimensions: (1) its policy content—the mandate communicated, more or less clearly, by that norm; (2) authority signal—the extent to which the norm seems authoritative or legitimate to those to whom it is communicated; and (3) control intention—the expectation that sufficient resources will be invested by those with power in the international system to make the norm effective—in common parlance, to "enforce" it. See, e.g., W. Michael Reisman, *International Lawmaking: A Process of Communication*, 78 AM. SOC'Y INT'L L. PROC. 101 (1981).

217. THOMAS M. FRANCK, *RECOURSE TO FORCE* 45 (2002); see also U.N. Charter art. 51.

218. See Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention]. The Court has held, for example, as recently as 2004 and 2005, that self-defense may be invoked only against states. See *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 116, paras. 144-47 (Dec. 19); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 194-95 (July 9). Yet the plain text of Article 51 does not place that limitation on what it describes as an "inherent" right of self-defense; the right is simply triggered if "an armed attack occurs." U.N. Charter art. 51. The author of that attack need not be another state.

violence.<sup>219</sup> In *Corfu Channel*,<sup>220</sup> the ICJ's first judgment—and the first to pronounce (in dictum) on the new *jus ad bellum* of the Charter—the Court held unlawful a U.K. mine-sweeping operation carried out in Albanian territorial waters in the Corfu Strait. The United Kingdom swept that strait after an incident in which British warships had been disabled and casualties suffered because of the mines. While the Court held Albania liable for its mining and affirmed the customary right of warships to innocent passage through straits, it denied the United Kingdom's asserted entitlement to self-help in the face of Albania's mining of the Corfu Strait and attacks on British vessels traversing it.

In a well-known dictum, the ICJ wrote that it could “only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law.”<sup>221</sup> *Corfu Channel* has thus, accurately or not, come to stand for the proposition that Article 2(4)'s prohibition on the unilateral resort to force does not depend on whether, or how effectively, the U.N. Charter's collective security machinery functions.<sup>222</sup> This may be inevitable, for as a creature of the U.N. Charter, it would be remarkable for the Court to declare the Charter a dead letter. Yet *Corfu Channel* created a disconnect between the formal law of the Charter, as elaborated by the ICJ, and actual state practice. This disconnect has become increasingly apparent over time. It has led the ICJ, at times, to elide, confuse, or simply fail to engage with difficult but pressing questions raised by the *jus ad bellum* and the *jus in bello* in subsequent law-of-war opinions.

## 2. Nicaragua

More than thirty-five years later, in the watershed judgment in *Military and Paramilitary Activities in and Against Nicaragua*,<sup>223</sup> the Court not only reinforced the dictum in *Corfu Channel*,<sup>224</sup> it went on to establish, based on little more than a nonbinding resolution of the General Assembly defining aggression,<sup>225</sup> a high threshold for the sort of armed attack under Article 51 that would suffice to permit a state lawfully to respond in self-defense.<sup>226</sup> In particular, the Court drew a dubious and vague distinction between “mere frontier incident[s]” and “armed attack[s],” and it held that only the latter give

219. Reisman, *supra* note 10, at 83-84.

220. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

221. *Id.* at 35.

222. See Christopher Greenwood, *The International Court of Justice and the Use of Force*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 379 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996); see also HIGGINS, *supra* note 129, at 240; Manley O. Hudson, *The Twenty-Eighth Year of the World Court*, 44 AM. J. INT'L L. 1 (1950).

223. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

224. *Id.* at 103-04.

225. *Id.* at 93-94 (citing G.A. Res. 3314 (XXIX), Annex art. 3, para. (g), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 14, 1974)).

226. *Id.*; see Greenwood, *supra* note 222, at 380; Oscar Schachter, *Disputes Involving the Use of Force*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 223, 223 (Lori Fisler Damrosch ed., 1987).

rise to an *ad bellum* right of self-defense.<sup>227</sup> State practice and *opinio juris*—the textbook components of custom, which the ICJ purported to ascertain independently, but which it conveniently and without much analysis found to supply a customary law identical to the Charter—indicated a far more complex regime.<sup>228</sup> But whatever the accuracy of the Court's holding as a matter of custom, the upshot of *Nicaragua* is that states which suffer attacks that fall short of the ICJ's "armed attack" threshold must, in its view, simply endure low-intensity violence, even in the face of a paralyzed Security Council that proves consistently unable to respond as the Charter presupposes.<sup>229</sup>

Relative to the dualistic axiom, *Nicaragua's* analysis of Articles 2(4) and 51 (or rather, their purported customary analogues) encouraged one form of conflation that afflicts the contemporary law of war: collapsing the initial judgment about the legality of a particular resort to force into the *ad bellum* proportionality inquiry. *Nicaragua* effectively detached the Article 51 self-defense right from the Article 2(4) framework. It created a new *lex specialis* of "armed attack" whereby only *some* uses of force that violate the Charter, although illegal, may "be resisted by force in self-defense, no matter how reasonably necessary and proportionate the latter may be, because only some amount to an 'armed attack.'"<sup>230</sup> And absent the "condition *sine qua non* required for the exercise of the right of collective self-defence," the ICJ said, "the appraisal of . . . necessity and proportionality takes on a different significance."<sup>231</sup>

By restrictively redefining "armed attack"<sup>232</sup> and subordinating *ad bellum* necessity and proportionality constraints to its initial judgments about the legality of resort to force under the Charter, the ICJ established a regime that prioritizes the oft-politicized *ad bellum* judgments that international law (and previously, just war theory) historically has been unable to regulate effectively. Partially for this reason, the ICJ has since struggled, largely in vain, to cabin allegedly defensive uses of force rather than to confront the difficult, but probably more constructive, regulatory issues about *ad bellum* proportionality. Greenwood aptly asks

why a state that is the victim of one of the lesser forms of force should not resist such force . . . by itself resorting to military means. . . . Of course one can sympathize with the

227. *Nicaragua*, 1986 I.C.J. at 103.

228. See, e.g., Anthony D'Amato, *Trashing Customary International Law*, 81 AM. J. INT'L L. 101, 103 (1987); Thomas M. Franck, *Some Observations on the ICJ's Procedural and Substantive Innovations*, 81 AM. J. INT'L L. 116, 118-19 (1987).

229. E.g., Franck, *supra* note 228, at 120; Reisman, *supra* note 10, at 89. The ICJ said that states victimized by low-intensity armed force may take "proportionate countermeasures," *Nicaragua*, 1986 I.C.J. at 122, but this part of the judgment is notoriously vague. See HIGGINS, *supra* note 129, at 250-51.

230. John Lawrence Hargrove, *The Nicaragua Judgment and the Future of the Law of Force and Self-Defense*, 81 AM. J. INT'L L. 135, 138 (1987).

231. *Nicaragua*, 1986 I.C.J. at 122. In *Nicaragua* and its progeny, the Court also adopted the textually unfounded view that only states may be the authors of armed attacks giving rise to a right of self-defense. *Nicaragua*, 1986 I.C.J. at 119; see also *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, paras. 144-47 (Dec. 19); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 194-95 (July 9).

232. Greenwood, *supra* note 222, at 379.

Court's evident desire to ensure that a minor use of force does not lead to a wholly excessive response. *Any exercise of the right of self-defence is, however, subject to the principle of proportionality. Insistence on compliance with that principle is a more effective and realistic way of seeking to prevent an excessive military response than the creation of an artificial distinction between different degrees of the use of force.*<sup>233</sup>

In *Nicaragua*, as in *Corfu Channel*, the ICJ's decision may to some extent be both institutionally understandable and defensible. The ICJ sees itself as the judicial guardian of the Charter's *ad bellum* regime, and the Court itself is a creature of the Charter. Yet that does not fully account for the Court's views, which seem to be motivated more by a tacit policy decision than anything in the explicit language of the Charter. The ICJ's focus on the initial *ad bellum* legality of a use of force, and in particular, its *lex specialis* of armed attack, has led it to marginalize those *ad bellum* components of the law of war, especially proportionality, that might be more efficacious in practice. And its approach in *Nicaragua*—to affirm a parsimonious definition of armed attack and focus principally on the initial *ad bellum* legality of force rather than to analyze contemporary, unconventional conflicts in all their complexity—persists to date.

### 3. Oil Platforms

Consider first *Oil Platforms*.<sup>234</sup> Iran sought reparations for two strikes on Iranian offshore oil complexes. The United States launched those strikes in response to attacks on Kuwaiti vessels during the "Tanker War" between Iran and Iraq.<sup>235</sup> On October 16, 1987, a missile hit a Kuwaiti tanker, the *Sea Isle City*, which had been reflagged to the United States for protection. The United States ascribed the attack to Iran and responded three days later by attacking Iranian oil complexes.<sup>236</sup> On April 14, 1988, the *Samuel B. Roberts* "struck a mine in international waters near Bahrain while returning from an escort mission"; again, the United States ascribed the attack to Iran and responded by attacking offshore Iranian oil platforms.<sup>237</sup>

Applying *Nicaragua*, the ICJ held that neither of these strikes, even in the context of a broader pattern of Iranian attacks,<sup>238</sup> qualified as an armed attack sufficient to give rise to a right of self-defense under the Charter.<sup>239</sup> It then collapsed that initial judgment of *ad bellum* illegality into the question of whether the U.S. strikes were proportionate to the incidents.<sup>240</sup>

As a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither 'Operation Praying Mantis' as a whole, nor even that part of it that destroyed the *Salman* and *Nasr*

233. *Id.* at 381 (emphasis added).

234. *Oil Platforms* (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6).

235. *Id.* at 174-76.

236. *Id.* at 175.

237. *Id.* at 175-76.

238. *Id.* at 191.

239. *Id.* at 192; *id.* at 195-96.

240. *See id.* at 197-99.

platforms, can be regarded, in the circumstances of this case, as a proportionate use of force in self-defence.<sup>241</sup>

At first blush, this may appear to be a reasonable application of *ad bellum* proportionality. But in practice, the ICJ's approach tends to eviscerate *ad bellum* proportionality as a distinct constraint on force—for, in effect, it insists that each military incident be atomized and analyzed in isolation rather than contextually.

Rather than analyze the *ad bellum* necessity and proportionality of the U.S. strikes in the context of the Tanker War and the pervasive threat to neutral (including U.S.-flagged) vessels in the Persian Gulf, the ICJ disaggregated the conflict into a series of discrete, atomized incidents.<sup>242</sup> A defensive strike is only *ad bellum* necessary, in this view, if carried out, first, in *immediate* response to a particular attack and, second, against the attack's *direct* source.<sup>243</sup> In contrast, the Court said, strategic strikes in self-defense carried out in an effort to deter future attacks of the same sort were per se unlawful. Once the initial attack ends, it reasoned, so too does the *ad bellum* necessity for self-defense.<sup>244</sup> And because needless force is illegal, it must also be disproportionate. Consequently, the ICJ remarked in a similar vein that to be *ad bellum* proportionate, a strike must be proportional to the particular atomized attack that prompts it, rather than to the object of self-defense in the context of the conflict as a whole.<sup>245</sup> The result of this logic is that *ad bellum* necessity and proportionality dissolve as distinct constraints on the use of force: they collapse back into the initial judgment about the legality of resort to self-defense. Because few atomized strikes meet the *Nicaragua* threshold, and because self-defense in response to any single strike will be, on this view,

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241. *Id.* at 198-99.

242. In appraising *ad bellum* proportionality in dicta, however, the Court somewhat inconsistently *did* focus on the broader context of conflict. It said that it could not ignore the fact that the discrete U.S. strikes that formed the basis of Iran's complaint were part of a broader defensive operation, "Operation Praying Mantis," and that the mining of a single ship "by an unidentified agency" could not justify such a large-scale military operation. *See id.* at 198; *see also id.* at 194. If the ICJ deemed it appropriate to examine the broader operational context in which the U.S. strikes took place, it is unclear why it simultaneously excluded from its analysis the broader operational context of that defensive operation, namely, the Iran-Iraq Tanker War and the consequent threat to neutral vessels in the Persian Gulf.

243. *See id.* at 198. Because the Court only looked to the *jus ad bellum* in *Oil Platforms* in the context of the U.S.-Iran Friendship, Commerce, and Navigation Treaty (FCN), it also failed to distinguish clearly between (1) necessity as a part of the *jus ad bellum*; and (2) necessity as an interpretation of the FCN's textual exemption of conduct deemed "necessary" by the states parties to the FCN to protect their security interests. *See id.* at 182. Judge Higgins pointed out, with considerable force, that it is ill advised for the Court to examine the *jus ad bellum* "through the eye of a needle that is the freedom of commerce clause of a 1955 FCN Treaty." *Id.* at 231-32 (separate opinion of Judge Higgins); *see also id.* at 291-93 (dissenting opinion of Judge Elaraby).

244. The Court thus implicitly adopted Iran's view that "once an attack is over, as was the case here, there is no need to repel it, and any counter-force no longer constitutes self-defence. Instead it is an unlawful armed reprisal or a punitive action." Reply and Defense to Counter-Claim of the Islamic Republic of Iran, at 176, *Oil Platforms*, 2003 I.C.J. 161, available at <http://www.icj-cij.org/docket/files/90/8630.pdf>.

245. *See Oil Platforms*, 2003 I.C.J. at 198-99; *see also id.* at 333-34 (separate opinion of Judge Simma). Judge Simma makes this explicit, stressing that, in his view, under the *Nicaragua* doctrine of "proportionate countermeasures," it would have been lawful for the United States to counter the Iranian attacks "immediately" with "defensive measures designed to eliminate the *specific source of the threat or harm to affected ships in, and at the time of, the specific incidents.*" *Id.* at 333 (emphasis added).

needless and disproportionate, it seems “that a state which has been the object of an illegal attack can never take the initiative or that its forces may only fire if fired upon.”<sup>246</sup>

*Oil Platforms* may thus be understood as a variation on the “just war” syllogism set out earlier: if *no* force may lawfully be used against a target, then how can *any* particular quantum of force be necessary or proportionate? Again, the defect here is not of logic but experience. Because the collective security machinery of the Charter remains largely dysfunctional even in the post-Cold War era, and *a fortiori* in the post-9/11 era, states invoke, and will foreseeably continue to invoke, self-defense to justify resort to force. Just as the dualistic axiom insists that legal and illegal force alike comply with the *jus in bello*, including its proportionality constraint, so too should legal and illegal force alike be required to comply with *ad bellum* proportionality. Otherwise, this theoretically distinct constraint on force collapses back into the initial judgment about the lawfulness of that force, degrading the efficacy of the *jus ad bellum* as a whole. States may well be influenced to mitigate the amount or manner of force applied to a target. But seldom if ever will they relinquish the right to resort to force altogether in circumstances of perceived self-defense or national security.

#### 4. Armed Activities

*Armed Activities*, probably the most significant recent decision on the law of war, reflects the same misguided view. In it, the ICJ declined to determine the *jus ad bellum* applicable to a chaotic, multiparty civil war that had spilled over the borders of the Democratic Republic of the Congo (DRC) and threatened the national security of adjacent states, including Uganda. It instead assimilated the facts to a traditional interstate conflict and applied the incongruous *Nicaragua* framework. Judge Kooijmans accurately critiqued the majority’s analysis, stressing that it

inadequately reflects the structural instability and insecurity in the region, the overall pattern of lawlessness and disorder and the reprehensible behaviour of all parties involved. A reading of the Judgement cannot fail to leave the impression that the dispute is first and foremost a dispute between two neighbouring States about the use of force and the ensuing excesses, perpetrated by one of them. A two-dimensional picture may correctly depict the object shown but it lacks depth and therefore does not reflect reality in full.<sup>247</sup>

In particular, Uganda had intervened in the eastern region of the DRC based on the perceived threats to its national security set forth in the “Safe Haven” document promulgated by the Ugandan High Command.<sup>248</sup> It asserted a need, among other *ad bellum* goals, (1) to “neutralize . . . Uganda[n] dissident groups which have been receiving assistance from the Government of the DRC and the Sudan”; and (2) “[t]o prevent the genocidal elements, namely, the Interahamwe and ex-FAR, which have been launching attacks on the

246. Greenwood, *supra* note 11, at 223.

247. *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116 (Dec. 19) (separate opinion of Judge Kooijmans, para. 14).

248. *Id.* para. 109 (majority opinion).

people of Uganda . . . from continuing to do so.”<sup>249</sup> Just as the United States did not, despite *Nicaragua* and its progeny, refrain from attacking Afghanistan given that the Taliban regime hosted nonstate actors that had attacked the United States repeatedly, neither could Uganda reasonably be expected to allow hostile nonstate belligerents to operate against it from within chaotic regions of the eastern DRC—nonstate belligerents which Kabila’s dysfunctional government proved either unable or unwilling to control.

Still, citing *Nicaragua*, the ICJ insisted that Uganda could not avail itself of the right to self-defense.<sup>250</sup> Tellingly, it considered in this regard only “one of the five listed objectives” of Operation Safe Haven because only one, in its view, “refer[red] to a response to acts that had already taken place.”<sup>251</sup> Now, in part, it seems likely that the ICJ did not want to opine on, still less be perceived to validate, either anticipatory or preventive self-defense in light of the U.S. assertion of the latter right in its 2002 National Security Strategy.<sup>252</sup> But the ICJ thereby, as Judge Kooijmans observed, elided the critical issues in *Armed Activities* and “missed a chance to fine-tune the position it took 20 years ago in spite of the explicit invitation by one of the Parties to do so.”<sup>253</sup> It absolved itself of its paramount obligation as the judicial organ of the United Nations: to answer the questions of international law raised by disputes submitted to it consensually by states—in this case, questions about how the Charter’s *jus ad bellum* applies to “large-scale attacks by irregular forces.”<sup>254</sup>

Judge Simma, too, lamented this missed opportunity.<sup>255</sup> He noted that “a restrictive reading of Article 51 might well have reflected the state, or rather the prevailing interpretation, of the international law of self-defence for a long time,” but that “in the light of more recent developments not only in State practice but also with regard to accompanying *opinio juris*, it ought urgently to be reconsidered.”<sup>256</sup> Furthermore, as in *Oil Platforms*, the Court declined to consider how *ad bellum* proportionality applied once it found unlawful Uganda’s initial resort to force.<sup>257</sup> At least tacitly, the majority reasoned that its initial finding of *ad bellum* illegality obviated the need to examine issues of *ad bellum* proportionality: again, *no* force, by this misguided logic, can be *ad bellum* proportionate if force may not be deployed in the first place.<sup>258</sup> *Armed Activities*, like *Oil Platforms*, degrades the efficacy

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249. *Id.*

250. *See id.* paras. 142-47.

251. *Id.* para. 143.

252. *See* THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), <http://www.whitehouse.gov/nsc/nss.pdf>.

253. 2005 I.C.J. 116 (separate opinion of Judge Kooijmans, para. 25).

254. *Id.* para. 147).

255. *See id.* (separate opinion of Judge Simma, paras. 8-15).

256. *See id.* para. 11 (emphasis added).

257. *See id.* (separate opinion of Judge Kooijmans, paras. 31-33) (critiquing the Court for its failure to examine necessity and proportionality in this regard and concluding that some Ugandan military action should be deemed both necessary and proportionate, even though Uganda subsequently violated these *ad bellum* conditions).

258. That said, the Court did, appropriately, proceed to consider the DRC’s allegations of *in bello* violations by Ugandan forces. But it nonetheless failed to apply the dualistic axiom correctly, both because it neglected to consider *in bello* proportionality and because it intimated that the legality *vel non* of Uganda’s “belligerent occupation” of part of the DRC changed the applicable *jus in bello*. *See id.* paras. 60-61 (majority opinion).



of the *jus ad bellum*: Uganda might mitigate the manner or quantum of force it applies, but it is extremely unlikely to relinquish its right to self-defense if it perceives, rightly or not, a threat to its national security. Offering guidance on *ad bellum* regulatory strategies like proportionality, rather than simply condemning force as unlawful under the anachronistic *Nicaragua* framework, therefore might well increase the efficacy of the modern law of war.

## 5. The Wall

The ICJ's advisory opinion in *The Wall* illustrates the point.<sup>259</sup> The Court's bottom line—that the wall built by Israel in the Occupied Territories violates its obligations under both IHL and international human rights law—strikes me as accurate.<sup>260</sup> Israeli settlements in the West Bank violate, *inter alia*, Article 49(6) of the Fourth Geneva Convention.<sup>261</sup> But because of Israel's decision not to participate in the advisory proceedings, and because of the Court's failure to conduct an independent, impartial investigation for itself (or even to solicit additional evidence), the majority manifestly lacked "the requisite factual bases for its sweeping findings."<sup>262</sup> Even assuming, as Judge Buergenthal stressed,

that on a thorough analysis of all the relevant facts, a finding could well be made that some or even all segments of the wall . . . violate international law . . . . [T]o reach that conclusion with regard to the wall as a whole without having before it or seeking to ascertain all relevant facts bearing directly on issues of Israel's legitimate right of self-defense, military necessity and security needs, given the repeated deadly terrorist attacks in and upon Israel proper coming from the Occupied Palestinian Territory to which Israel has been and continues to be subjected, cannot be justified as a matter of law. . . . In my view, the humanitarian needs of the Palestinian people would have been better served had the Court taken these considerations into account, for that would have given the *Opinion* the credibility I believe it lacks.<sup>263</sup>

In fact, the majority opinion lacks not only credibility but analytic clarity relative to the proper analysis of the law of war. The result is, as Judge Buergenthal emphasizes, a disservice to the humanitarian objectives that the majority purports to vindicate.

Assume the Court correctly found that Israel cannot assert a right of self-defense in this context and that the wall as such therefore violates the

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259. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

260. *Id.* at 201.

261. *Id.* at 182-84.

262. *Id.* at 240 (declaration of Judge Buergenthal). To decide the validity of Israel's security claims, the Court relied on little more than a report by the Secretary-General of the United Nations and a statement Israel submitted "limited to issues of jurisdiction and judicial propriety," although the Court said it included "observations on other matters," including Israel's security concerns. *Id.* at 162; *see also id.* at 243-44 (declaration of Judge Buergenthal) (noting that the Court "fails to address any facts or evidence specifically rebutting Israel's claim of military exigencies or requirements of national security" and "barely addresses the summaries of Israel's position on this subject that are attached to the Secretary-General's report and which contradict or cast doubt on the material the Court claims to rely on"). It would have been advisable, in my judgment, for the ICJ not to hear the case as a matter of its discretion. *See Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, 28-29 (Oct. 16); *Status of Eastern Carelia*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5, at 28-29 (July 23); *see also* 2004 I.C.J. at 207-11 (separate opinion of Judge Higgins).

263. 2004 I.C.J. at 240-41 (declaration of Judge Buergenthal) (emphasis added).

Charter's *jus ad bellum*.<sup>264</sup> The dualistic axiom should be understood to insist that this conclusion is irrelevant to Israel's duty to respect (1) *ad bellum* necessity and proportionality; and (2) the *jus in bello* in its entirety, including *in bello* proportionality.<sup>265</sup> The ICJ failed to examine either issue. Instead, its analysis essentially ceased after it condemned the wall as unlawful force. It thereafter supplied little more than a conclusory litany of various treaty provisions that it said the wall violated.

It is not that the ICJ necessarily erred in finding the wall unlawful (or in violation of these treaties); it is that, *even so*, the dualistic axiom should have led the Court to offer guidance on *ad bellum* and *in bello* law beyond merely condemning illegal force. Instead, the ICJ effectively allowed its conclusion that Israel lacked the right to self-defense to obviate the need for this analysis. Whatever the *ad bellum* legality of the wall as a measure of self-defense, for example, the dualistic axiom requires an independent *in bello* proportionality analysis—that is, an analysis of the extent to which the wall may be “expected to cause incidental loss of civilian life, injury to civilian objects, or a combination thereof, which would be *excessive in relation to the concrete and direct military advantage anticipated*.”<sup>266</sup> The Court (lacking evidence on this issue) simply neglected it. In fact, *The Wall* may be seen as an extreme version of denying the analytic independence of *ad bellum* and *in bello* judgments: it suggests that the former not only affect but *determine* the latter. Relative to *in bello* proportionality, the Court, without evidentiary analysis, offered only the *ipse dixit* that it

is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order.<sup>267</sup>

But absent a bona fide appraisal of Israel's avowed security needs or claims of military exigency, this conclusion rings hollow: “[t]he Court says that it ‘is not convinced’ but it fails to demonstrate why it is not convinced, and that is

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264. I seriously doubt this conclusion. The wall, like the U.S. naval blockade of Cuba during the Cuban Missile Crisis, is a weapon—a defensive weapon, to be sure, but a weapon. Its lawfulness as self-defense depends on whether Israel has been the victim of an “armed attack.” U.N. Charter art. 51; cf. Schachter, *supra* note 28, at 134. The Court cursorily dismisses this possibility in a single paragraph, unsupported by authority, in which it claims that Article 51 only permits self-defense in response to the “armed attack by one State against another State,” 2004 I.C.J. at 194. *But see* Schachter, *supra* note 29, at 311. The Court also claims that the right of self-defense does not apply against threats that originate from within a state's territory. 2004 I.C.J. at 194. The first proposition is doubtful: the text of Article 51 contains no such limitation, and its imposition is in tension with recent resolutions of the Security Council. *See id.* at 242 (declaration of Judge Buergenthal); *id.* at 215 (separate opinion of Judge Higgins); *id.* at 229-30 (separate opinion of Judge Kooijmans). The second proposition is equally doubtful: states retain the right to respond in self-defense to insurgencies within their own territory, provided their response is necessary and proportionate and otherwise complies with international law. *Id.* at 215 (separate opinion of Judge Higgins). The Court also contradicts itself by ignoring the essential (and accurate) premise of the remainder of its opinion: that the Occupied Territories do *not* constitute Israeli territory under international law. *See id.* at 166-67.

265. *See* Sassòli, *supra* note 11, at 251-52.

266. Protocol I, *supra* note 30, art. 51(5)(b) (emphasis added).

267. 2004 I.C.J. at 193.

why these conclusions are not convincing.”<sup>268</sup> A more credible and sophisticated analysis would have sought and considered evidence bearing on the asserted military exigency carefully, even assuming the wall were unlawful,<sup>269</sup> and then opined on proportionality relative to “individual segments of its route.”<sup>270</sup>

The ICJ’s tacit justification for disregarding the dualistic axiom in *The Wall* seems to be the view criticized by Lauterpacht more than fifty years ago: that any effort to offer guidance on the conduct of hostilities in the context of unlawful force might confer a veneer of legitimacy on that force. This is misguided, for “[i]t is not the existence of rules for the conduct of war which causes states to resort to force but more fundamental factors in international relations.”<sup>271</sup> The foregoing logic is also counterproductive. Unsurprisingly, and as experience since *The Wall* attests, Israel will not accept (nor would any state) the Court’s cavalier dismissal of its national security interests. Nor will it obey an order to dismantle the wall forthwith. That does not mean the ICJ should refrain from declaring a situation unlawful or issuing an appropriate remedy because it anticipates disobedience; only that it should not allow this initial finding to obviate the need for further legal analysis. It is not unreasonable to believe that had the ICJ made its views on proportionality available, Israel would have considered them.

This is not speculation: Israeli decisions suggest the same. In *Beit Sourik Village Council v. Israel*,<sup>272</sup> and *Mara’abe v. Prime Minister of Israel*,<sup>273</sup> the Israeli Supreme Court considered the complex, fact-intensive judgments about *in bello* proportionality raised by the wall (or security fence). Based on a sophisticated *in bello* analysis, it ordered parts dismantled, other parts modified to take less injurious routes, and changes to Israeli law. These orders, backed by effective domestic institutions of enforcement, did much more to ameliorate the injuries to Palestinians than did the ICJ’s opinion, which simply declared the wall unlawful and then neglected the hard questions about *in bello* proportionality. This is not to suggest that the Israeli Supreme Court necessarily gave the right answer on each issue. But its willingness to work out a concrete theory of *in bello* proportionality and to apply it to the factually complex, politically sensitive circumstances of the conflict contributed far more to IHL’s objectives than the ICJ’s categorical declaration and elision of the dualistic axiom.

True, the ICJ has a limited capacity for factfinding and a distinct institutional role within the international system. It would be misguided to suggest that the Court could, or should, have undertaken an analysis

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268. *Id.* at 244 (declaration of Judge Buergenthal).

269. *Id.*

270. *Id.*

271. Greenwood, *supra* note 11, at 233.

272. HCJ 2056/04 Beit Sourik Village Council v. Israel [2004] IsrSC 58(5) 807; *see also* Sarah Williams, *Has International Law Hit the Wall? An Analysis of International Law in Relation to Israel’s Separation Barrier*, 24 BERKELEY J. INT’L L. 192 (2006).

273. HCJ 7957/04 Mara’abe v. Prime Minister of Israel [2005] IsrSC 58(2) 393; *see also* Victor Kattan, *The Legality of the West Bank Wall: Israel’s High Court of Justice v. the International Court of Justice*, 40 VAND. J. TRANSNAT’L L. 1425 (2007); Geoffrey R. Watson, *International Decision: Mara’abe v. Prime Minister of Israel*, 100 AM. J. INT’L L. 895 (2006).

comparable in specificity or approach to that contained in the Israeli decisions. But had it rigorously analyzed the *jus in bello* after finding the wall unlawful, *Beit Sourik* and *Mara'abe* suggest that its judgment would have been considered seriously by the Israeli courts. By declining to engage difficult *in bello* issues, the ICJ failed to offer guidance to a state whose judiciary has historically treated international law seriously. Because domestic incorporation and internalization is one of the most effective means by which international law is enforced,<sup>274</sup> the ICJ's approach in *The Wall* seems not only misguided but counterproductive. It did little but weaken the ICJ's credibility and authority for the future. *The Wall*'s failure to analyze the facts rigorously or to consider Israel's claims of military necessity diminishes the decision's force. Outside the politically charged context of the Israeli-Palestinian conflict, one may be sure that states, relative to themselves, will not heed a judgment that dismisses the relevance of their national security interests.

*The Wall* also took the misguided logic of *Oil Platforms* one step further. In *Oil Platforms*, the Court found the U.S. attacks unjustified under the U.N. Charter and then collapsed *ad bellum* necessity and proportionality into its initial judgment that the U.S. strikes violated Article 51. In *The Wall*, the Court collapsed both *ad bellum* and *in bello* proportionality into its dubious conclusion about the scope of Article 51: that self-defense may only be invoked against states. Despite its significance, this issue occupied a single paragraph in the opinion.<sup>275</sup> By blurring the *ad bellum-in bello* distinction, the Court forwent an opportunity to shape international law, to influence state behavior, and perhaps to reduce superfluous suffering in war, the paramount objective of modern IHL.

## 6. Nuclear Weapons

In its advisory opinion in *Nuclear Weapons*, the consequences of the ICJ's myopic focus on regulating the contingencies for resort to self-defense in the first instance rather than on the more difficult issues of *ad bellum* and *in bello* law led to a holding that most regard as, at best, confused. The General Assembly had asked the ICJ to advise it whether "the threat or use of nuclear weapons [is] in any circumstances permitted under international law."<sup>276</sup> After dismissing certain nondispositive alternative arguments, the ICJ turned to "the most directly relevant applicable law": the law "relating to the use of force enshrined in the United Nations Charter and the law applicable in armed conflict which regulates the conduct of hostilities."<sup>277</sup> It suggested, that is, that both *ad bellum* and *in bello* law bear on the legality of the threat or use of nuclear weapons.

274. See, e.g., Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2645-58 (1997).

275. 2004 I.C.J. at 194.

276. G.A. Res. 49/75K, U.N. Doc. A/RES/49/75K (Dec. 15, 1994).

277. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 243 (July 8).

The ICJ opined that although the unique characteristics of nuclear weapons, including their awesome destructiveness and inherent inability to respect the principle of distinction, “seem[] scarcely reconcilable with” the *jus in bello*, it lacked “sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.”<sup>278</sup> In part, the Court may have had in mind the hypothetical circumstances posed by Judge Schwebel in dissent, for example, the tactical use of a nuclear depth charge to disable a nuclear-armed submarine known to be planning a direct attack on a city in the target state.<sup>279</sup> Yet the ICJ’s Delphic and controversial 7-7 holding, broken by its president, suggests another possibility. The Court notoriously held that while

the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; . . . [it] cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.<sup>280</sup>

The former sentence, it seems, declares nuclear weapons “generally” illegal under the *jus in bello* (except, perhaps, in unlikely scenarios such as those suggested by Judge Schwebel).<sup>281</sup> The latter proposes that nuclear weapons might still be lawful given high enough stakes. As Judges Higgins and Schwebel alike stressed, this *de facto non liquet* holding is breathtaking.<sup>282</sup> no state had even argued that a use of nuclear weapons that violates the *jus in bello* may become lawful if it satisfies the *jus ad bellum*.<sup>283</sup> If this reading is accurate, the ICJ’s holding clearly violates the dualistic axiom, for the *jus in bello* does not, in this view, apply uniformly to all parties. Rather, the state acting in an “extreme circumstance of self-defence . . . in which [its] very survival . . . would be at stake” apparently may use weapons that would be legally prohibited were they deployed by its adversary.<sup>284</sup>

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278. *Id.* at 262-63.

279. *Id.* at 320-21 (dissenting opinion of Judge Schwebel).

280. *Id.* at 266.

281. *But see id.* at 367 (dissenting opinion of Judge Higgins) (finding the use of the word “generally” ambiguous).

282. *See id.* at 322 (dissenting opinion of Judge Schwebel); *id.* at 368-69 (dissenting opinion of Judge Higgins). The ICJ’s *non liquet* holding may reflect “the central dilemma of contemporary international law,” i.e., “the place of the state in a system that simultaneously recognizes the state as the source of its norms and interprets those norms in a transnational, principled fashion. . . . Survival of the sovereign state can appear to be as much a first principle of an international moral order as justice, peace, or human rights.” Paul W. Kahn, *Nuclear Weapons and the Rule of Law*, 31 N.Y.U. J. INT’L L. & POL. 349, 373 (1999). Yet contemporary, in contrast to classical, international law sees sovereignty as a value contingent on the actual, rather than speculative, sociopolitical life and national culture of the people in which it, theoretically, now resides. *E.g.*, Luban, *Just War and Human Rights*, *supra* note 35, at 204 (distinguishing *nations*, which possess moral rights derived from their constituents, from *states*, which do not); Reisman, *supra* note 40, at 869 (distinguishing the locus of sovereignty in classical versus contemporary international law). To regard the survival of states as a first-order moral principle that trumps human dignity and concrete human rights mistakenly presumes a contingent value for an abstraction that is inaccurate for many, perhaps most, contemporary states and should not, at any rate, be the basis for a universal rule of contemporary international law.

283. 1996 I.C.J. at 590 (dissenting opinion of Judge Higgins).

284. DINSTEIN, *supra* note 48, at 161 (quoting Shabtai Rosenne, *The Nuclear Weapons Advisory Opinions of 8 July 1996*, 27 ISRAEL Y.B. ON HUM. RTS. 263, 296 (1997)).

Another plausible reading, however, is that the ICJ rejected the dualistic axiom in an even deeper sense. Note that it related Article 51 to what it described as “the fundamental right of every *State* to survival, and thus its right to resort to self-defence . . . when its survival is at stake.”<sup>285</sup> This suggests that the Court may not have intended to imply that force that violates the *jus in bello* might still be legal if it satisfies the *jus ad bellum*. Rather, as suggested earlier, the Court may have had in mind scenarios that political theorists refer to as supreme emergencies. If so, the ICJ arguably meant that where “the very survival of a *State* would be at stake,”<sup>286</sup> nuclear weapons would not violate *in bello* proportionality at all because of the peculiar logic of supreme emergency theory, which elevates states to or well beyond the moral status of persons. The *jus in bello*, that is, ceases to be as relevant, or relevant at all, if “the fundamental right of [a] *State* to survival”<sup>287</sup> is at stake.

Needless to say, a right of states to survive does not appear in the U.N. Charter or other positive law. Consistent with the logic of supreme emergency, it rather seems to be an assertion about an allegedly inherent right of states, which derives from their presumed associative value. On this view, states, like individuals in Hobbes’s state of nature, have a natural right to self-defense and survival that cannot be relinquished. If this reading is correct, *Nuclear Weapons* involves a frequent, but always questionable and often dangerously anachronistic, argument: that states may coherently be analogized to people and that they necessarily enjoy an equal or greater moral status in international law.

On either view, the ICJ’s opinion has disquieting implications beyond the unique horror of nuclear weapons. There is no principled reason to limit its logic to particular weapons or methods of warfare. Chemical or biological weapons, too, would be justified to ensure a state’s survival, as would torture, summary execution, terrorism, denial of quarter, and other *in bello* violations—provided only that the cost of military defeat in *ad bellum* terms reaches a sufficient level, that is, the destruction of a state or (perhaps) a cognate nonstate polity. A core purpose of the dualistic axiom is to avoid this kind of misguided logic. Taken to its extreme, it leads inexorably to the destruction of independent constraints on the use of force by polities. Such entities may, in this view, arrogate to themselves an associative value that exceeds the aggregate interests of their constituents. Even apart from general philosophical objections, one obvious problem with this contention in the context of international law is that it cannot be limited in principle to the survival of “desirable” polities—say, to liberal democratic states.<sup>288</sup> States like North Korea may equally invoke this sort of logic to justify IHL violations and disregard the dualistic axiom—as may nonstate collectives, such as al-Qaeda, that espouse some collective, sacred value higher than the individual.

285. 1996 I.C.J. at 263 (emphasis added).

286. *Id.* at 266 (emphasis added).

287. *Id.* at 263 (emphasis added).

288. Cf. The Secretary-General, *Report of the Secretary-General’s High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, ¶ 191, U.N. Doc. A/59/565 (Dec. 2, 2004) (“Allowing one to so act is to allow all.”).

## 7. Conclusion

From its inception, the ICJ has focused almost exclusively on preserving its restrictive reading of Article 51 of the U.N. Charter in its jurisprudence of war. In part as a result, it has paid little attention to working out the concrete contours of the distinct requirements of *ad bellum* and *in bello* proportionality. It has effectively reasoned, in the spirit of the just war syllogism explored earlier, that where a state, in its view, violates Article 51 because the armed attack threshold established in *Nicaragua* has not been met, no quantum of force can qualify as *ad bellum* necessary or proportionate. Nor, according to *The Wall*'s logic, is it necessary to examine *in bello* proportionality once it has been determined that a state had no right to resort to force in the first instance. This jurisprudence tends to degrade the efficacy of *ad bellum* and *in bello* proportionality as distinct and independent constraints on force. It treats (arguable) violations of Article 51 as sufficient to obviate the need for a more in-depth legal analysis. Most disturbing, according to the logic of *Nuclear Weapons*, *ad bellum* goals that presuppose the associative value of politics qua politics, like the "very survival of a State," apparently may supersede *in bello* requirements, even of an absolute nature, authorizing tactics that IHL absolutely prohibits.

### B. Conflation in State Practice

The ICJ's decisions do not necessarily offer the best indicia of the actual state of international law or practice. Yet recent state practice also suggests how failure to apply the dualistic axiom may affect the conduct of hostilities. Below, I briefly examine three examples: (1) NATO's 1999 air campaign against Serbia in an avowed effort to prevent ethnic cleansing in Kosovo; (2) the brief but tragic conflict between Israel and Hezbollah in Lebanon in the summer of 2006, which, for lack of a common name, I refer to as the Thirty-Four Day War; and (3) the resurrection of candidly *justified* torture as a tactic of war.<sup>289</sup>

#### 1. Kosovo

In March 1999, Serbian forces launched attacks on the Kosovo Liberation Army and targeted ethnic Albanian civilians.<sup>290</sup> In response, NATO organized air strikes against Serbian targets, flying more than 38,000

289. The practice of torture did not cease despite the emergence of international human rights law prohibiting it in all circumstances and a general consensus that its prohibition is now *jus cogens*. See *Filartiga v. Peña-Irala*, 630 F.2d 876, 883-84 (2d Cir. 1980). See generally RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmts. b & k (1987). What is new is the candid acknowledgment of torture and efforts to *justify* it within the framework of IHL or otherwise.

290. See generally *Hearing on Kosovo After-Action Review Before the S. Armed Servs. Comm.*, 106th Cong. 2 (1999) (statement of William S. Cohen, Sec'y of Defense, & Gen. Henry H. Shelton, Chairman of the Joint Chiefs of Staff), available at <http://www.dod.mil/dodgc/olc/docs/test99-10-14CohenShelton.pdf>.

sorties over the course of the conflict.<sup>291</sup> A ground invasion might well have been more effective and efficient and, as relevant here, might have better enabled NATO to distinguish between civilians and combatants. The aerial war, according to most analysts, took more time than a ground war, killed or injured more civilians, and caused more damage to Serbia's civilian infrastructure,<sup>292</sup> not to mention accidents like the bombing of the Chinese Embassy.<sup>293</sup>

NATO members chose to carry out the war solely by air, however, because their political elites believed their domestic constituents would not tolerate casualties. And to minimize the risk to pilots from Serbian anti-aircraft defenses, NATO planes flew at a minimum height of 15,000 feet.<sup>294</sup> After some strikes mistakenly killed civilians, including refugees, NATO's *in bello* conduct came under intensified scrutiny.<sup>295</sup> Critics argued that NATO could have averted these mistakes with better target-sighting techniques, in particular, visual confirmation (either by pilots flying at lower altitudes or by ground troops confirming target selection).<sup>296</sup> This criticism intensified when the war did not end as quickly as NATO had anticipated. As the campaign's success seemed less certain and Serbian President Slobodan Milošević refused to relent promptly, the issue of potential ground troop deployment gained renewed attention.<sup>297</sup> NATO never sent troops into Kosovo, however, because of both the difficulty of achieving supranational consensus<sup>298</sup> and the expected domestic political opposition to any military action that would risk casualties.<sup>299</sup>

On June 10, 1999, after nearly four months, the conflict ended. Total civilian casualties numbered around five hundred,<sup>300</sup> and Serbia had sustained severe damage to its civilian infrastructure. These facts, among others,

291. *Hearing Before the S. Armed Servs. Comm.*, 106th Cong. 3 (1999) (statement of Gen. Wesley Clark, Admiral James Ellis, Jr. & Lt. Gen. Michael Short), available at <http://www.dod.mil/dodgc/olc/docs/test99-10-21Clark.pdf>.

292. See, e.g., Tania Voon, *Pointing the Finger: Civilian Casualties of NATO Bombing in the Kosovo Conflict*, 16 AM. U. INT'L L. REV. 1083, 1096-113 (2001).

293. *Id.* at 1108-10.

294. INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (ICTY): FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA (June 8, 2000), reprinted in 39 I.L.M. 1257, 1273 (2000) [hereinafter ICTY REPORT]; see also Olivera Medenica, *Protocol I and Operation Allied Force: Did NATO Abide by Principles of Proportionality?*, 23 LOY. L.A. INT'L & COMP. L. REV. 329, 406 (2001).

295. ICTY REPORT, *supra* note 294, at 1257-58.

296. See, e.g., Medenica, *supra* note 294, at 406-09.

297. See, e.g., Eric Schmitt & Michael R. Gordon, *British Pressing Partners To Deploy Ground Troops*, N.Y. TIMES, May 18, 1999, at A10.

298. See Jane Perlez, *Clinton and the Joint Chiefs To Discuss Ground Invasion*, N.Y. TIMES, June 2, 1999, at A14.

299. Blaine Harden & John M. Broder, *Clinton's Aims: Win the War, Keep the U.S. Voters Content*, N.Y. TIMES, May 21, 1999, at A1. In fact, the polls were less conclusive on this point than commonly thought. Andrew Kohut, *Beware of Polls on the War*, N.Y. TIMES, Apr. 8, 1999, at A27; see Lieutenant Colonel Jeffrey K. Walker, *Thomas P. Keenan Memorial Lecture: The Demise of the Nation-State, the Dawn of New Paradigm Warfare, and a Future for the Profession of Arms*, 51 A.F. L. REV. 323, 335 (2001).

300. ICTY REPORT, *supra* note 294, at 1272 (citing HUMAN RIGHTS WATCH, CIVILIAN DEATHS IN THE NATO AIR CAMPAIGN (2000), available at <http://www.hrw.org/reports/2000/nato>).



weakened popular support for NATO's conduct<sup>301</sup> and motivated various organizations to appraise the legality of NATO's tactics *ex post*.<sup>302</sup> Multiple parties even requested that ICTY Prosecutor Carla Del Ponte investigate NATO for war crimes,<sup>303</sup> although she found a full investigation unwarranted based on a report prepared by a committee established to review NATO's *in bello* conduct.<sup>304</sup> The Prosecutor's Report embraced the dualistic axiom. It rejected any notion "that the 'bad' side had to comply with the law while the 'good' side could violate it at will" and based this view on the usual rationale that a legal asymmetry "would be most unlikely to reduce human suffering in conflict."<sup>305</sup> The Report also acknowledged that military commanders are obliged:

- a) to do everything practicable to verify that the objectives to be attacked are military objectives,
- b) to take all practicable precautions in the choice of methods and means of warfare with a view to avoiding or, in any event to minimizing incidental civilian casualties or civilian property damage, and
- c) to refrain from launching attacks which may be expected to cause disproportionate civilian casualties or civilian property damage.<sup>306</sup>

Now, "everything practicable" does not mean "everything." But it is unclear whether the Report held NATO to the former standard. Its analysis of *in bello* proportionality elides the question whether NATO acted lawfully by focusing on an alleged lack of clarity in IHL.<sup>307</sup> Even though, it says, "NATO air commanders have a duty to take practicable measures to distinguish military objectives from civilians or civilian objectives," and even though they deliberately avoided any risk to NATO combatants by flying at an altitude that "meant the target could not be verified with the naked eye," still, "it appears that with the use of modern technology, the obligation to distinguish was effectively carried out in the vast majority of cases during the bombing campaign."<sup>308</sup> Furthermore, the Report says, "there is nothing inherently unlawful about flying above the height which can be reached by enemy air defenses."<sup>309</sup>

These conclusions may be right, yet many commentators have concluded otherwise.<sup>310</sup> And apart from strict questions of legality, NATO's tactics "sent a message that could hardly be lost on the world: that Americans

301. Jane Perlez, *3 Options for Washington, All With Major Risks*, N.Y. TIMES, May 21, 1999, at A12.

302. E.g., AMNESTY INT'L, NATO/FEDERAL REPUBLIC OF YUGOSLAVIA: "COLLATERAL DAMAGE" OR UNLAWFUL KILLINGS? VIOLATIONS OF THE LAWS OF WAR BY NATO DURING OPERATION ALLIED FORCE (2000), available at <http://www.amnesty.org/en/library/info/EUR70/018/2000/en>.

303. ICTY REPORT, *supra* note 294, at 1257-58.

304. Voon, *supra* note 292, at 1086-87.

305. ICTY REPORT, *supra* note 294, at 1266.

306. *Id.* at 1265.

307. *Id.* at 1271. But see Anthony J. Colangelo, *Manipulating International Criminal Procedure: The Decision of the ICTY Office of the Independent Prosecutor Not To Investigate NATO Bombing in the Former Yugoslavia*, 97 NW. U. L. REV. 1393, 1424 (2003) (concluding, based on an analysis of the incidents and allegations, that "the international law is clear and that the [Report] failed to accurately apply that law").

308. ICTY REPORT, *supra* note 294, at 1273.

309. See *id.* But see Colangelo, *supra* note 307, at 1424.

310. See, e.g., Medenica, *supra* note 294, at 393, 408; Voon, *supra* note 292.

considered one American life to be worth thousands of Yugoslav lives—hardly a resounding endorsement of the doctrine of universal human rights.”<sup>311</sup> Of course, even if NATO violated IHL at the margins and deployed questionable tactics from a policy perspective, it is clearly a distinct question whether it would be appropriate to prosecute NATO combatants for war crimes given the nature of the alleged violations.<sup>312</sup> *Arguable* violations of *in bello* proportionality by NATO at the margins do not compare to the deliberate targeting of civilians, still less to the kind of serious atrocities on which the Tribunal has properly focused: extrajudicial killing, rape, torture, ethnic cleansing, and the like. But an impartial review of the Report would at a minimum leave some doubt in the reviewer’s mind as to whether NATO’s *ad bellum* justification for the air strikes did not affect its conclusions about the legality of NATO’s *in bello* conduct.

NATO engaged in a four-month campaign of brutal air strikes against Serbia, deploying fighter planes at heights that reduced the risk to its own combatants to zero at the cost of a substantial increase in the risk to Serbia’s civilians.<sup>313</sup> Beyond more than five hundred civilian deaths, Serbian civilians suffered horrible injuries, and its economy and infrastructure sustained severe damage from which it still has not fully recovered. Had the avowed goal of the air strikes been to annex Kosovo or to further—rather than to halt—ethnic cleansing,<sup>314</sup> would the Report have been so quick to dismiss allegations that NATO violated *in bello* proportionality? Concededly, we can only speculate. But many organizations and analysts have suggested it would not have been. I endorse NATO’s action under the circumstances. But we should acknowledge that NATO’s avowed *ad bellum* goal, which some described as legitimate even if not lawful, arguably influenced its *in bello* conduct.

## 2. The Thirty-Four Day War

On July 12, 2006, a Hezbollah attack on the Israeli Defense Forces (IDF) rapidly escalated into a thirty-four day conflict,<sup>315</sup> ending in a U.N.-brokered ceasefire.<sup>316</sup> Both Israel and Hezbollah attacked dual-use targets and civilian areas during the war, killing, injuring, and displacing civilians.<sup>317</sup>

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311. David Luban, *Intervention and Civilization*, in GLOBAL JUSTICE AND TRANSNATIONAL POLITICS: ESSAYS ON THE MORAL AND POLITICAL CHALLENGES OF GLOBALIZATION 79, 82 (Pablo De Greiff & Ciaran Cronin eds., 2002).

312. See Colangelo, *supra* note 307, at 1436; see also Human Rights Watch, The Milosevic Case: Questions and Answers, <http://hrw.org/english/docs/2001/08/29/serbia1819.htm> (last visited Oct. 30, 2008) (concluding that even though certain incidents in the NATO campaign “violated the laws of war,” they “did not . . . rise to the more serious level of ‘grave breaches’ or war crimes that the tribunal is empowered to prosecute”).

313. See AMNESTY INT’L, *supra* note 302.

314. On NATO’s objectives, see Christine M. Chinkin, Comment, *Kosovo: A “Good” or “Bad” War?*, 93 AM. J. INT’L L. 841, 841 n.2 (1999). But see Michael Mccgwire, *Why Did We Bomb Belgrade?*, 76 INT’L AFF. 1 (2000).

315. The conflict began around 8 A.M. local time on July 12, 2006, and ended in a cease-fire at 8 A.M. on August 14, 2006. In terms of twenty-four-hour periods, the conflict continued for thirty-three days, but it encompassed thirty-four calendar days.

316. See S.C. Res. 1701, U.N. Doc. S/RES/1701 (Aug. 11, 2006).

317. See, e.g., HUMAN RIGHTS WATCH, WHY THEY DIED: CIVILIAN CASUALTIES IN LEBANON DURING THE 2006 WAR 4 (2007), available at <http://hrw.org/reports/2007/lebanon0907>. Both parties also at times used indiscriminate weapons such as cluster munitions. *Id.* at 11-12.

Israel, for example, attacked Beirut's airport, media transmission stations, and transportation routes.<sup>318</sup> Its attack on Qana killed scores of civilians.<sup>319</sup> In its defense, Israel emphasized that Hezbollah intentionally used these civilian areas for military operations and turned civilians into "human shields."<sup>320</sup> Both sides engaged in retaliatory rhetoric and suggested that *in bello* violations perpetrated by their forces could be justified as reprisals. Sheik Nasrallah, Hezbollah's leader, said that "[a]s long as the enemy acts without limitations or red lines, it's our right to continue the confrontation without limits."<sup>321</sup> At one point, Israeli U.N. Ambassador Gillerman, responding to allegations that Israel was using disproportionate force, replied, "You're damn right we are."<sup>322</sup>

Israel appealed to the nature of Hezbollah to justify its strikes in civilian areas. It appealed, that is, to an *ad bellum* consideration (the nature of the enemy) to justify *prima facie in bello* violations. Foreign Minister Tzipi Livni argued that "[p]roportionality is not compared to the event, but to the threat, and the threat is bigger and wider than the captured soldiers. Unfortunately, civilians sometimes pay the price of giving shelter to terrorists."<sup>323</sup> In a Security Council meeting, Gillerman apologized for the civilian deaths but stressed the "huge moral disequivalence between the two sides," for "[w]hile our enemies . . . specifically target women and children . . . , we are defending ourselves in this brutal war."<sup>324</sup>

Both of the preceding statements mix *in bello* considerations (the principle of distinction, civilians) with *ad bellum* ones (self-defense, the nature of the threat).<sup>325</sup> While the IDF and Hezbollah alike seem to have violated IHL,<sup>326</sup> for present purposes, the point of emphasis lies less in those

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318. AMNESTY INT'L, ISRAEL/LEBANON: DELIBERATE DESTRUCTION OR "COLLATERAL DAMAGE"? ISRAELI ATTACKS ON CIVILIAN INFRASTRUCTURE (2006), available at <http://www.amnesty.org/en/library/asset/MDE18/007/2006/en/dom-MDE180072006en.pdf>.

319. President of the Security Council, *Statement by the President of the Security Council Delivered to the Security Council*, U.N. Doc. S/PRST/2006/35 (July 30, 2006). Israel argued that it had warned civilians to leave the area. U.N. Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council"*, ¶ 36, U.N. Doc. A/HRC/2/7 (Oct. 2, 2006) (prepared by Philip Alston et al.) [hereinafter U.N. Human Rights Council, *Implementation*].

320. U.N. Human Rights Council, *Implementation*, *supra* note 319, ¶¶ 68-71.

321. Jad Mouawad & Steven Erlanger, *Israel Bombards Lebanon After Hezbollah Hits Haifa with Missiles*, N.Y. TIMES, July 17, 2006, at A1; *see also* U.N. Human Rights Council, *Implementation*, *supra* note 319, ¶¶ 68-71.

322. Steve Erlanger, *With Israeli Use of Force, Debate over Proportion*, N.Y. TIMES, July 19, 2006, at A1; *see also* Greg Myre, *Offering Video, Israel Answers Critics on War*, N.Y. TIMES, Dec. 5, 2006, at A1.

323. Erlanger, *supra* note 322.

324. U.N. SCOR, 61st Sess., 5498th mtg. at 5, U.N. Doc. S/PV.5498 (July 30, 2006) (emphasis added).

325. Israel's arguments in support of its actions also reflected the rhetoric of preventive self-defense: that its goal was to deprive Hezbollah of its ability to conduct future strikes. *See, e.g.*, Seymour M. Hersh, *Watching Lebanon: Washington's Interests in Israel's War*, NEW YORKER, Aug. 21, 2006, at 28 ("[A] national-security adviser to the Knesset . . . told me, . . . 'Hezbollah is armed to the teeth and trained in the most advanced technology of guerilla warfare. It was just a matter of time. We had to address it.'").

326. U.N. Human Rights Council, *Implementation*, *supra* note 319, ¶¶ 99-100. Others reached the same conclusion. *E.g.*, Press Release, Office of the U.N. High Comm'r for Human Rights, High Commissioner for Human Rights Condemns All Actions Targeting Civilians in Lebanon and Israel (July 20, 2006), available at <http://www2.ohchr.org/english/press/newsFrameset-2.htm> (follow "By Official"

violations as such than it does in the failure of both the belligerents and their critics to distinguish *ad bellum* from *in bello* violations. Cannizzaro notes that critics frequently referred to the “disproportionate character of Israel’s response” without clarifying “which kind of proportionality was being referred to. Quite often the[] statements contain[ed] elements of both *jus ad bellum* and *jus in bello* arguments.”<sup>327</sup> In fact, the war raised distinct issues for each of these bodies of law. One question is the *ad bellum* legality of Israel’s resort to force and its *ad bellum* proportionality relative to the *casus belli* that, for Israel, justified it. Another, which should be distinct, is the *in bello* proportionality of particular strikes.

The immediate *casus belli* for Israel’s incursion into Lebanon was Hezbollah’s attack with Katyusha rockets and mortars launched from Lebanese territory at IDF bases near the Israeli border town of Zarit.<sup>328</sup> Hezbollah used those attacks as a diversion. During them, it crossed the border into Israel, attacked an IDF patrol, kidnapped two Israeli soldiers, killed three, and wounded two.<sup>329</sup> Israel responded with a rescue mission. An attack by Hezbollah then claimed the lives of four of the Israeli soldiers engaged in “hot pursuit.”<sup>330</sup> Israel thus argued that Hezbollah’s attacks, in the aggregate, justified its use of force in self-defense. Although an early (July 12) Israeli Cabinet communiqué suggested that Israel would hold Lebanon “responsible for the action that originated on its soil,”<sup>331</sup> Israel soon modified its asserted *casus belli*. A July 16 statement clarified that “Israel is not fighting Lebanon but the terrorist element there, led by Nasrallah and his cohorts, who have made Lebanon a hostage and created Syrian—and Iranian—sponsored terrorist enclaves of murder.”<sup>332</sup>

Israel’s *casus belli* thus relied on the U.S. precedent of attacking Afghanistan for harboring al-Qaeda during and after the attacks of 9/11—except that scant evidence suggested that the government of Lebanon, unlike the Taliban relative to al-Qaeda, actively supported Hezbollah. In fact, the situation bore more resemblance to Uganda’s justification for its military incursion into the DRC based on the inability of Kabila’s regime to control forces hostile to Uganda in the eastern region of that vast state, which, like Afghanistan, had been in the midst of a chaotic civil war. The ICJ, as noted,

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hyperlink; then follow “High Commissioner/Deputy HC” hyperlink); Anthony D’Amato, *War Crimes and the Mideast Conflict*, JURIST, July 24, 2006, <http://jurist.law.pitt.edu/Forumy/2006/07/war-crimes-and-mideast-conflict.php>.

327. Enzo Cannizzaro, *Contextualizing Proportionality: Jus Ad Bellum and Jus In Bello in the Lebanese War*, 88 INT’L REV. RED CROSS 779, 781 (2006). Conflation of *ad bellum* and *in bello* proportionality is not an uncommon feature of international legal and political discourse. *See id.*

328. The Secretary-General, *Report of the Secretary-General on the United Nations Interim Force in Lebanon*, ¶ 3, U.N. Doc. S/2006/560 (July 21, 2006).

329. Victor Kattan, *Israel, Hezbollah, and the Conflict in Lebanon: An Act of Aggression or Self-Defense?*, 14 HUM. RTS. BRIEF 26 (2006).

330. *Id.*

331. Press Release, Isr. Ministry of Foreign Affairs, Special Cabinet Communique—Hizbullah Attack (July 12, 2006), available at <http://www.mfa.gov.il/MFA/Government/Communiques/2006/Special%20Cabinet%20Communique%20-%20Hizbullah%20attack%2012-Jul-2006>; *see also* ISR. MINISTRY OF FOREIGN AFFAIRS, ISRAEL’S WAR WITH HIZBULLAH 2 (2007).

332. Press Release, Isr. Ministry of Foreign Affairs, Cabinet Communique (July 16, 2006), available at <http://www.mfa.gov.il/MFA/Government/Communiques/2006/Cabinet%20Communique%2016-Jul-2006>.

has not, despite explicit invitations, offered guidance on the *jus ad bellum* that applies in this kind of increasingly common situation. Furthermore, beyond the question whether Israel's initial resort to force was *ad bellum* lawful, the war raised deeply complex questions of *ad bellum* proportionality. Launching a full-scale, transborder war in response to a relatively trivial attack by Hezbollah initially seems manifestly disproportionate. And that would be an accurate conclusion based on *Nicaragua* and its progeny. Yet is that a plausible or realistic way to analyze the situation?

In Israel's view, the kidnapping culminated a series of similar attacks that should be properly analyzed, not as isolated, atomized incidents, but in the aggregate.<sup>333</sup> Livni thus emphasized that proportionality must be judged in terms of the overall threat posed by Hezbollah, not "as an answer to a single incident."<sup>334</sup> John Bolton, then U.S. Ambassador to the United Nations, offered a comparable defense of Israel's resort to force. Responding to allegations that Israel acted disproportionately, he remarked:

What Hezbollah has done is kidnap Israeli soldiers and rain rockets and mortar shells on innocent Israeli civilians. What Israel has done in response is an act of self-defense. And I don't quite understand what the argument about proportionate force means here. Is Israel entitled only to kidnap two Hezbollah operatives and fire a couple of rockets aimlessly at Lebanon?<sup>335</sup>

Bolton's remark, despite the rhetorical sarcasm, reflects a very real and troubling gap in international law.

Proportionality, in both its *in bello* and *ad bellum* manifestations, is not, as EU Foreign Policy Chief Javier Solana said with reference to the *in bello* law governing the Thirty-Four Day War, "a mathematical concept."<sup>336</sup> It is clearly not calculated according to the archaic *lex talionis* principle. But few seem to know how it should be calculated. Relative to the *jus ad bellum*, *Nicaragua* and its progeny hold that a minor cross-border incursion does not qualify as an armed attack sufficient to authorize self-defense. Yet in an era characterized by internal conflicts between nonstate belligerents, terrorist strikes emanating from states that prove unable or unwilling to control their borders, and asymmetrical wars of attrition, is it realistic to suppose that states will tolerate repeated "minor" attacks, which may amount to "death by a thousand pinpricks"? At some point, a state will deem those attacks, in the aggregate, an armed attack that justifies self-defense every bit as much as a conventional attack by one state on another, the paradigm in the minds of the U.N. Charter's drafters. Some therefore argue that Israel's initial resort to self-defense in the Thirty-Four Day War can be justified given recent state

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333. See, e.g., Press Release, Isr. Ministry of Foreign Affairs, Behind the Headlines: The Second Lebanon War—One Year Later, (July 12, 2007), available at <http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/The%20Second%20Lebanon%20War%20-%20One%20year%20later%20-%20July%202007>.

334. Herb Keinon, *Israel Dismisses Assad Cease-Fire Call as 'Bizarre'*, JERUSALEM POST, July 20, 2006, at 1.

335. CNN.com, *Bolton Defends Israel's Actions in Lebanon*, July 24, 2006, <http://www.cnn.com/2006/WORLD/meast/07/23/mideast.bolton/index.html>.

336. Keinon, *supra* note 334. Israeli Foreign Minister Livni expressed this view in the *ad bellum* context, while EU Foreign Policy Chief Solana expressed a comparable view relative to *in bello* law. Yet neither these speakers nor the article reporting their comments distinguishes the two.

practice,<sup>337</sup> even if the *casus belli* did not render *ad bellum* proportionate *particular* strikes in Lebanon “beyond the territory controlled by Hezbollah.”<sup>338</sup>

Israel defended its military response in terms redolent of the U.S. view of *ad bellum* proportionality rejected by the ICJ in *Oil Platforms*: that it is *ad bellum* proportionate, not only to respond in self-defense to the direct, immediate source of an attack, during the duration of that attack, but also to use defensive force in response to one attack as a means to deter like attacks prospectively. In an interview conducted one year after the Thirty-Four Day War, Israeli Prime Minister Ehud Olmert invoked the “need to restore deterrence” to justify Israel’s resort to self-defense and said the war had succeeded.<sup>339</sup> He referred in this regard to Nasrallah’s widely reported view that had Nasrallah known what would eventuate because of his decision to order the kidnappings, “he wouldn’t have started the war.”<sup>340</sup>

Again, the point of emphasis is not whether the parties violated the *jus ad bellum* or the *jus in bello*. Whatever one’s conclusions on these issues, the Thirty-Four Day War evinces *ad bellum-in bello* conflation and, in particular, widespread confusion about the meaning of each body of law’s distinct proportionality component. Given geopolitical, military, and technological change since 1945, the law of war can no longer afford to take the path of least resistance adopted by the ICJ in the *Armed Activities* judgment handed down one year before this tragedy in Lebanon. It can no longer afford to elide the issue of how the *jus ad bellum* applies to unconventional scenarios—which have, in reality, become far more common than “conventional” ones. By neglecting them, the law not only fails to offer guidance or to influence the conduct of participants in contemporary wars; it also facilitates abuses by those participants—state and nonstate alike.

### 3. *The Resurrection of Rationalized Torture*

In February 2008, Michael Hayden, Director General of the Central Intelligence Agency (CIA), acknowledged that the CIA had subjected three al-Qaeda detainees to waterboarding in 2002 and 2003,<sup>341</sup> although he said that it had not used waterboarding since then.<sup>342</sup> The U.S. executive branch presently refuses, however, to acknowledge that waterboarding is either illegal as such or a form of torture. In fact, in a letter to the Senate Judiciary Committee, U.S. Attorney General Mukasey wrote that waterboarding might again be authorized in the future, although

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337. See, e.g., Tom Ruys, *Crossing the Thin Blue Line: An Inquiry into Israel’s Recourse to Self-Defense Against Hezbollah*, 43 STAN. J. INT’L L. 265, 267 n.7 (2007) (collecting sources).

338. *Id.* at 292; Cannizzaro, *supra* note 327, at 780.

339. Press Release, Isr. Ministry of Foreign Affairs, Interview with Prime Minister Ehud Olmert on “Al Arabiya” (July 10, 2007), available at <http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2007/PM%20Olmert%20interviewed%20on%20al%20Arabia%2010-Jul-2007>.

340. *Id.*

341. Mark Mazzetti, *Intelligence Chief Says Al Qaeda Improves Ability To Strike in U.S.*, N.Y. TIMES, Feb. 6, 2008, at A1.

342. *Id.*; see also Scott Shane, *Waterboarding Focus of Inquiry by Justice Dept.*, N.Y. TIMES, Feb. 23, 2008, at A1.

the CIA director would [first] have to . . . ask [the Attorney General] . . . if its use would be lawful—taking into account the particular facts and circumstances at issue, including how and why it is to be used, the limits of its use, and the safeguards that are in place for its use.<sup>343</sup>

He added that in “some circumstances . . . current law would appear clearly to prohibit waterboarding’s use. But other circumstances would present a far closer question.”<sup>344</sup> Rudy Giuliani, the former mayor of New York City and Republican presidential candidate, suggested in a similar vein that waterboarding’s legality “depends on how it’s done. It depends on the circumstances. It depends on who does it.”<sup>345</sup> When Senator Kennedy asked Mukasey directly whether waterboarding is torture, Mukasey replied that were it “done to [him],” he “would feel that it was,”<sup>346</sup> but he refused to classify it legally as torture and therefore as categorically prohibited under extant law.

Other high-level officials have similarly defended, frequently on utilitarian grounds, techniques they refer to euphemistically as measures of “enhanced” interrogation. Vice President Richard Cheney said that CIA interrogation abroad is “a tougher program, for tougher customers,” which “has uncovered a wealth of information that has foiled attacks against the United States.”<sup>347</sup> Justice Antonin Scalia argued that an imminent threat could justify “smacking someone in the face” and suggested that this position puts one on a slippery slope to torture.<sup>348</sup> These and comparable views contrast starkly with past U.S. treatment of torture generally and waterboarding in particular, which the United States had formerly not only characterized clearly as torture but also prosecuted as a capital crime.<sup>349</sup> As of this writing, Congress’s effort to limit CIA interrogation techniques to those listed in the Army Field Manual, which explicitly prohibits waterboarding, have met with repeated opposition from the executive branch.<sup>350</sup>

It would be a needless digression to revisit contemporary debates over the “ticking time-bomb” scenario, about which much has been written.<sup>351</sup>

343. Press Release, U.S. Dep’t of Justice, Remarks Prepared for Delivery by Attorney General Michael B. Mukasey at the Justice Department Oversight Hearing of the Senate Judiciary Committee (Jan. 30, 2008), <http://www.usdoj.gov/ag/testimony/2008/ag-testimony-080130.html>.

344. *Id.*

345. Michael Cooper, *Giuliani Questioned on Torture*, N.Y. TIMES, Oct. 25, 2007, at A20; see also Michael Cooper & Marc Santora, *McCain Rebukes Giuliani on Waterboarding Remark*, N.Y. TIMES, Oct. 26, 2007, at A23.

346. Philip Shenon, *Mukasey Will Not Rule Out Waterboarding*, N.Y. TIMES, Jan. 31, 2008, at A26.

347. Richard B. Cheney, Vice President’s Remarks at the Conservative Political Action Conference (Feb. 7, 2008), <http://www.whitehouse.gov/news/releases/2008/02/20080207-11.html>.

348. *Scalia Says He Sees a Role for Physical Interrogations*, N.Y. TIMES, Feb. 13, 2008, at A17.

349. Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT’L L. 468, 472 (2007).

350. Steven Lee Myers, *Bush Vetoes Bill on C.I.A. Tactics, Affirming Legacy*, N.Y. TIMES, Mar. 9, 2008, at A1; see also Michael Cooper, *McCain Draws Criticism on Torture Bill*, N.Y. TIMES, Feb. 17, 2008, at A27; Morris Davis, *Unforgivable Behavior, Inadmissible Evidence*, N.Y. TIMES, Feb. 17, 2008, § 4, at 12.

351. See, e.g., ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS* 131-63 (2002); David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005); see also TORTURE: A COLLECTION (Sanford Levinson ed., 2004); THE TORTURE DEBATE IN AMERICA (Karen Greenberg ed., 2006).

Rather, consider what these debates indicate about the continuing vitality of the dualistic axiom. In the first place, there can be no real question that waterboarding is torture under international law. The Convention Against Torture defines torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>352</sup>

The Convention, which the United States has ratified, further states: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."<sup>353</sup> Now, it is nonetheless perfectly reasonable—and, I believe, also politically desirable and appropriate—to debate *transparently* whether the Convention's absolute prohibition on torture (and customary law to the same effect) continues to reflect the right policy given contemporary threats; or whether we should modify the law so that torture will henceforth be subject to some form of consequentialist analysis.<sup>354</sup> But there can be no real legal question that this would be a *change* to, not a plausible or bona fide interpretation of, current law. Given the ordinary meaning of the Convention,<sup>355</sup> it is disingenuous to suggest otherwise.

Were torture no longer to be prohibited categorically, but instead subjected to a consequentialist analysis, it would be emblematic of two recent trends: on the one hand, the proliferation of IHL rules in the postwar era; on the other, a countervailing trend to transform IHL rules of an absolute nature into the kind of flexible, context-dependent constraints represented by principles of military necessity, proportionality, and distinction.<sup>356</sup> In part, this phenomenon involves a tacit regression to the discredited just war idea that, contrary to the dualistic axiom, the *jus in bello* may differ based on the nature of the conflict or of the enemy—that is, based on *ad bellum* factors. Yet the *jus ad bellum* remains, as it has been historically, oft-politicized, manipulable, and subject to self-serving interpretations based on the ideological commitments of the belligerents. Hence, it is said, waterboarding's legality depends on "who does it",<sup>357</sup> or that the manifestly euphemistic "tougher program" applied by the CIA to detainees abroad is lawful because of "tougher customers."<sup>358</sup> Again, a paramount problem with such clear

352. Convention Against Torture, *supra* note 188, art. 1(1).

353. *Id.* art. 2(2).

354. Without attempting to defend my views on this issue here, such a change would, in my judgment, be disastrous, even for the United States's self-interest narrowly conceived. I substantially agree with the positions on this issue articulated by David Luban and Jeremy Waldron. See Luban, *supra* note 351, at 1440-52; Waldron, *supra* note 351, at 1682-717.

355. See Vienna Convention, *supra* note 218, art. 31(1).

356. See Reisman, *supra* note 186, at 854-55.

357. Cooper, *supra* note 345. Presidential candidate Fred Thompson expressed similar sentiments. Michael Cooper & Marc Santora, *McCain Rebukes Giuliani on Waterboarding Remark*, N.Y. TIMES, Oct. 26, 2007, at A23.

358. Cheney, *supra* note 347.



violations of the dualistic axiom—with rendering theoretically uniform *in bello* obligations dependent on self-serving *ad bellum* characterizations—is that putative changes to international law cannot be limited in practice, even if they can be in normative ethics, to some belligerents but not others. In short, if the law against torture depends on who does it, there is no law against torture.

#### V. CONCLUSION: THE DUALISTIC AXIOM IN THE TWENTY-FIRST CENTURY

Law can control conduct by, among other strategies, prohibition and regulation. The law of war, including the *jus ad bellum* and the *jus in bello*, uses both strategies. The *jus ad bellum* tries to minimize resort to force in the first place by prohibiting it except for self-defense and force authorized by the Security Council.<sup>359</sup> But contemporary international law recognizes that, historically, the prohibition strategy has been—at best and charitably—partially successful. Since the late nineteenth century, the law of war has therefore focused increasingly on regulation: first, by elaborating flexible *in bello* principles of military necessity, proportionality, and discrimination; second, by dictating that, whatever the utilitarian calculi, some tactics, such as torture, should be absolutely prohibited; and third, by regulating the scope or intensity of force by means of customary principles of *ad bellum* necessity and proportionality.<sup>360</sup>

The dualistic axiom is indispensable to the efficacy of the law of war, such as it may be, because it theoretically ensures that relatively common, though debatable, *ad bellum* violations (that is, violations of the prohibition strategy) do not obviate or diminish the force of the regulatory strategy. As this Article suggests, however, modernity has witnessed an erosion of the dualistic axiom. In part, this reflects the practical pressures brought to bear on the law of war by advances in technology, geopolitical reconfiguration following the Cold War, and evolution in the nature of war itself. To retain relevance and potential efficacy, the law must candidly acknowledge and adapt to these changes, not elide them, as has the ICJ. It must also clarify the law's regulatory constraints, especially proportionality, with far more analytic rigor than it has to date.

I do not mean we should abandon the strategy of prohibition, as some suggest. I agree with appropriately qualified views that, for all its failings, the U.N. Charter framework prohibiting war as a general tool of statecraft

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359. U.N. Charter art. 2, para. 4.

360. The Charter says nothing about necessity and proportionality, but *Nicaragua*, which technically purported to construe customary international law on the use of force, held that custom imposes these *ad bellum* constraints simultaneously on all uses of armed force, see *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 127 (June 27), and this position finds substantial support in scholarship. See, e.g., DINSTEIN, *supra* note 13, at 225-26. Commentators generally trace the requirements of *ad bellum* necessity and proportionality to the famous *Caroline* incident. See *id.* at 248; see also 1 OPPENHEIM'S INTERNATIONAL LAW 420 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992). Yet this position is anachronistic. It grafts modern ideas about the legality of resort to force that postdate the U.N. Charter onto an incident that took place during the classical era of international law in which no *jus ad bellum* existed: states were legally free to use force (necessary or not, proportionate or not) for any reason. For an account of the *Caroline* incident, see 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 217, at 409-14 (1906); see also R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938).

diminishes the aggregate level of unauthorized coercion.<sup>361</sup> But it would be advisable for international law to focus also, and more deliberately, on refining the *ad bellum* and *in bello* regulatory strategies to meet the new geostrategic, military, and technological developments in warfare in the twenty-first century. To conclude, I therefore want to propose four clarifications or refinements of the dualistic axiom.

#### A. *Preservation of the Axiom*

As the dualistic axiom traditionally insists, *ad bellum* judgments should neither obviate nor modify *in bello* obligations. This means, *first*, that *in bello* constraints of a deontological, absolute nature must not be transformed *sub silentio* into contingent norms that may, in circumstances characterized as supreme emergency or otherwise, be subjected to consequentialist calculi. That change seems, as argued earlier, to reflect an anachronistic view that ascribes moral value to states *as states*, whereas contemporary international law regards people, not states, as the fundamental unit of value. It would also introduce into the law self-serving, oft-politicized judgments about the comparative value of polities. Whatever their truth, judgments of this kind degrade the *jus in bello*. Finally, this change could not be limited in practice to only certain polities. Again, if the international law against torture, for example, depends on who does it, or on under what circumstances, then, given how international law operates, there is no law against torture. Those who would change the absolute nature of certain *in bello* constraints may therefore want to consider the long-term, aggregate, and systemic consequences of such a change. For just as such changes cannot be limited to some polities but not others, neither can their scope be limited only to exigency. Torture, to stick with the same (regrettably timely) example, has a documented metastatic tendency, as the Abu Ghraib scandal illustrates.<sup>362</sup> The same goes for other *in bello* violations justified by supreme emergency theory.

Conversely, preserving the dualistic axiom requires, *second*, that *in bello* constraints of a flexible, consequentialist nature—those that *do* call for a balance between military advantage and civilian harm—be worked out concretely on a fact-sensitive, case-by-case basis. It would be a grave error, in law even if not necessarily in normative ethics, to understand “military advantage” architecturally, that is, as a concept that leads inexorably to one belligerent’s ultimate *casus belli* or to victory. If we view military advantage that way, it becomes difficult to escape the logic of writers like McMahan, who hold that the dualistic axiom cannot be sustained because the *jus ad bellum* inevitably affects, at a minimum, *in bello* proportionality. That is, in fact, why Protocol I and other formulations of the *in bello* proportionality constraint avoid architectural terms. They instead forbid strikes that would be excessive, not relative to the *casus belli*, but “to the concrete and direct

361. E.g., Henkin, *supra* note 214.

362. See, e.g., Waldron, *supra* note 351, at 1716-17 (citing, inter alia, Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124, 143 (1978)); see also Reisman, *supra* note 186, at 855-56.

military advantage anticipated.”<sup>363</sup> By articulating a conception of *in bello* proportionality at a lower level of abstraction, one tied to the concrete facts on the ground rather than dependent on abstract perceptions of ultimate justice or legal right, IHL strives to remove *in bello* proportionality calculi from oft-politicized *ad bellum* judgments.<sup>364</sup>

To be sure, it is doubtful that belligerents will always, or even often, be able to divorce these calculi entirely from their views about the legality or justice of the conflict. But in the first place, that is why the law insists on it; and second, in point of fact, IHL may be able to realize this aspiration more often than one might initially think. In conflicts between belligerents of roughly equal power, traditional enforcement dynamics like reciprocity encourage IHL compliance. In contrast, in conflicts where one party enjoys an overwhelming military advantage, such as the 1991 Gulf War or the Kosovo conflict, that party can often afford, so to speak, to adhere to IHL strictly—and it will have both reputational and humanitarian incentives to do so. Technology may also enable the stronger party to avoid significant (or perhaps, as in Kosovo, any) risk to its combatants, although the *in bello* lawfulness of this strategy is questionable.

Third, preserving the dualistic axiom requires that we recognize and confront candidly a new form of asymmetrical warfare: where one party is an elusive nonstate belligerent like al-Qaeda or a cognate “network of networks.”<sup>365</sup> Its goals may be unclear, or simply incompatible with nonnegotiable international human rights standards.<sup>366</sup> In this context, superior technology and military force in conventional terms will not offer the same advantages—and, incidentally, the same incentives to abide strictly by the *jus in bello*—as exist in the conflicts described above. It is here, as we have witnessed in the struggle against al-Qaeda and other manifestations of sacred terrorism,<sup>367</sup> that the temptation to violate the dualistic axiom (justified, often, by the allegedly novel nature of the enemy or the conflict) becomes strong.<sup>368</sup> The problem is that, once initiated, putative changes to the law cannot, realistically, be micromanaged, for example, by seeking to characterize the changes as applicable to some belligerents but not others. In reality, they spread rapidly, permeate the international legal process and the perspectives of its participants at many levels, and broadly influence the conduct of hostilities. Proposed modifications to the law of war should therefore ideally

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363. Protocol I, *supra* note 30, art. 57(2)(a)(iii) (emphasis added); *see also* HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov’t of Israel, Judgment, Dec. 11, 2005, para. 46, *available at* [http://elyon1.court.gov.il/files\\_eng/04/570/079/A14/04079570.a14.pdf](http://elyon1.court.gov.il/files_eng/04/570/079/A14/04079570.a14.pdf) (stressing that military advantage must not be speculative but rather direct and anticipated).

364. *See* Hurka, *supra* note 14, at 35.

365. *See* Sloane, *supra* note 10, at 473-78.

366. *Id.* at 467-73.

367. While I would not exclude strategically precise and careful uses of the military instrument in this struggle, “[‘Global War on Terror’] and similar phrases tend, in my judgment, to be imprecise, unhelpful, and often counterproductive from both a legal and a political perspective.” *Id.* at 447 n.21.

368. *See, e.g.,* Sassòli, *supra* note 11, at 258 (quoting William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal To Rationalize the Laws of War*, 73 Miss. L.J. 639, 680 (2004)); *id.* at 247, 261-62; Weiner, *supra* note 21, at 244.

be the product of a multilateral, transparent deliberative process rather than of unilateral, opaque decisions.<sup>369</sup>

*Fourth*, exigencies that are perceived, at least, as supreme emergencies will inevitably arise. It would be unrealistic to think that political elites charged with the responsibility for protecting their constituents will always *obey* the law of war. But that does not necessarily counsel *changing* the law. Law is one normative system; it is not everything. Sometimes it will—and perhaps should—be disobeyed in the service of the values and policies that inform its content.<sup>370</sup> But in a liberal democratic polity governed by the rule of law, elites who arrogate to themselves the power to act extralegally must, at a minimum, do so transparently, subjecting themselves to “after-the-fact political scrutiny.”<sup>371</sup> Political exigency itself cannot be grounds to override the law of war, lest it cease to exert even minimal influence on the conduct of hostilities that all but the most cynical of critics will generally admit, let alone to offer guidance to elites operating in good faith under favorable circumstances for rigorous application of the law.

#### B. *Concurrent Application of Ad Bellum and In Bello Proportionality*

*Ad bellum* law, including that of self-defense, operates principally at the level of polities. What value, if any, should the collective nature of polities receive in the determination of *ad bellum* proportionality? Despite profound postwar changes to international law, states continue to enjoy belligerent rights that are denied to other collectives. A conventional rationale for this is that states possess an associative value beyond the aggregative value constituted by the sum of their constituents’ interests.<sup>372</sup> But this associative value normatively depends on the nature of the state, on its political and legal system, and on the extent to which its constituents constitute a genuine polity. And at any rate, it must be a distinct question whether normative judgments about this value should bear on the law of war applicable to different polities.

Historically, each belligerent—and today, that includes not only states but terrorist networks, criminal syndicates, insurgent groups, and so on—claims the mantle of justice or self-defense for itself and denies it to the other. Mindful of this fact, it is clear that drawing normative distinctions between belligerents will badly disserve the values and policies that today underwrite the law of war: minimizing unauthorized coercion in the first place and reducing needless suffering and human rights violations in war. Because polities will predictably continue to make politicized *ad bellum* judgments, both components of proportionality should be kept distinct and applied concurrently.

369. See Sloane, *supra* note 10, at 478-84.

370. See JACK GOLDSMITH, *THE TERROR PRESIDENCY* 81 (2007); cf. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 206-22 (1977).

371. GOLDSMITH, *supra* note 370, at 80-81.

372. See ROUSSEAU, *supra* note 34, at 147-49. For a defense of this conception of the nation-state, see WALZER, *supra* note 1, at 54. For an enlightening exchange on it, see Luban, *Just War and Human Rights*, *supra* note 35; Luban, *Romance of the Nation-State*, *supra* note 35; Walzer, *supra* note 34.

Consequently, just as the dualistic axiom insists that the *jus in bello* applies equally to all parties, so too should it be understood to insist that *ad bellum* proportionality, the principal regulatory component of the modern *jus ad bellum*, applies uniformly, “without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.”<sup>373</sup> The ICJ’s jurisprudence has ill served postwar international law in this regard. Because force often proves insusceptible to prohibition, the law should focus equal or more attention on regulation. Rather than content itself with condemning states for *ad bellum* violations of the Charter under *Nicaragua*’s often anachronistic and incongruous framework, the Court, and other jurisgenerative institutions, should develop a more coherent and detailed conception of *ad bellum* proportionality. Insistence on the regulation of (allegedly) defensive force by the *ad bellum* proportionality constraint will be more likely to influence a state’s conduct than a categorical, black-or-white pronouncement that its resort to force violates the Charter.

### C. Exceptions to the Axiom?

The Kosovo conflict raises the question whether international law should ever countenance limited exceptions to, or modest relaxation of, the dualistic axiom. Suppose that a zero-casualty military campaign taking advantage of modern military technology is the sole politically feasible and practicable way to stop genocide or comparably serious human rights atrocities. Suppose further some state, or coalition of states, *were* able and willing to undertake that campaign provided it sustained essentially no casualties—but not otherwise. If that campaign, strictly speaking, would violate the *jus in bello*, should it ever, nonetheless, be authorized? On the one hand, it may be the only way to terminate an unconscionable crisis of the sort represented by the Rwandan genocide of 1994. On the other, it is inevitable that numerous innocent civilians will die, lose their homes, and suffer horrible injuries because, metaphorically speaking, technology, despite its tremendous advances, has yet to create a smart enough bomb.

This scenario poses a stark conflict of theoretically harmonious values. IHL, including the dualistic axiom, seeks to limit superfluous suffering and to protect human rights in war. International human rights law—including the *jus cogens* prohibition on genocide and the solemn, but tragically hypocritical, “never again” proclamations that postdate every genocide—counsel prompt intervention to halt atrocities on this scale. The goals of a humanized IHL may at times prove to be in at least modest tension with international human rights imperatives. Contrary to the dualistic axiom, it *may* be that in certain cases (in particular, where intervention in arguable violation of the dualistic axiom is the sole way to stop serious human rights atrocities), the same values that underwrite that axiom should countenance limited exceptions to it.<sup>374</sup> I stress “may” because the answer will almost certainly depend on fact-sensitive and

373. Protocol I, *supra* note 30, pmbl.

374. See Hurka, *supra* note 14, at 52–53.

value-intensive judgments that it would be imprudent to resolve in the abstract. Here, I only want to observe the potential tension between, on the one hand, a traditional axiom of IHL, which on the whole this paper has defended, and on the other, *jus cogens* norms to which international law is equally committed.

Another form of (at least arguable) violation of the axiom that has been evident recently poses a comparable, though perhaps less stark, tension: should a belligerent's *casus belli* ever be germane to what commentators increasingly refer to as the *jus post bellum*, i.e., the law governing, not only belligerent occupation, but at times, the transformation and reconstruction of a state after war? Traditionally, the law of war insisted that belligerents occupying another state, regardless of their *casus belli*, leave its laws and institutions untouched to the greatest extent compatible with military necessity, strictly defined. Recent nation-building exercises in Kosovo, Afghanistan, and Iraq, among other places, challenge this view. The emerging idea of transformative occupation, whatever its other merits, may well be in tension with the dualistic axiom.<sup>375</sup> Perhaps international law should authorize and even encourage this phenomenon in some circumstances anyway. Again, I raise the question to highlight a normative tension that the dualistic axiom may create in contemporary international law, not to suggest a categorical answer.

#### D. *Clarifying Ad Bellum and In Bello Proportionality*

International law must clarify, and insist on the strict implementation of, the distinction between *ad bellum* and *in bello* proportionality. Failure to do so is a characteristic mistake made by, for example, critics of the Thirty-Four Day War.<sup>376</sup> This mistake in part reflects international law's failure to explain proportionality except in terms so abstract as to border on the tautological.<sup>377</sup> Exploring proportionality in depth would require a separate paper. But I want to note here a few distinctions between *ad bellum* and *in bello* proportionality in an effort to clarify the proper application of each.

*Ad bellum* proportionality seeks to limit the quantum of force used in any resort to force. On one side of the scale, so to speak, is the *casus belli*, typically, an assertion of self-defense. But on the other, the relevant concept is *not*, as it would be for *in bello* proportionality, "collateral damage." *Ad bellum* proportionality is instead parasitic on *ad bellum* necessity. It is the imperative to use, to quote Webster's famous statement in the *Caroline* incident, no more force than necessary under the circumstances: "the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly

375. See Rotem Giladi, *The Jus Ad Bellum/Jus In Bello Distinction and the Law of Occupation*, 41 ISR. L. REV. 246 (2008). On transformative or "reformist" occupation, see, for example, GREGORY H. FOX, HUMANITARIAN OCCUPATION 45-58 (2008); Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195 (2005); and David J. Scheffer, *Beyond Occupation Law*, 97 AM. J. INT'L L. 842 (2003). See also JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 85-133 (2006).

376. See, e.g., *Mind Those Proportions*, ECONOMIST, July 29, 2006, at 43-44.

377. See, e.g., GARDAM, *supra* note 27, at 24-25.

within it.”<sup>378</sup> An act is *ad bellum* disproportionate if the same *ad bellum* objective sought by force clearly could have been achieved by diplomacy or another nonviolent strategy at a roughly comparable, or even moderately greater, cost.<sup>379</sup>

One plausible reading of *Caroline*, which the ICJ has adopted, is the “atomized” view: that defensive force must be limited to what is *immediately* necessary to respond to the *direct* source of an attack. *Ad bellum* proportionality, in this view, means that “the intensity of self-defense must be about the same as the intensity defended against.”<sup>380</sup> This parsimonious, almost *lex talionis*, position leads to absurd results and does not conform to state practice. In *Oil Platforms*, for example, it meant that once the attack on the *Sea Isle City* ended, so too did any necessity for self-defense. Any subsequent response would perforce be needless and disproportionate were it directed against an Iranian target other than the source of the Iranian missile. No state, in practice, would accept this conception of *ad bellum* proportionality if faced with repeated assaults from another state’s territory, notwithstanding *Nicaragua* and its progeny.

The principal alternative conception of *ad bellum* proportionality is the “aggregative” view: self-defense must be *ad bellum* proportionate to the *aggregate* attacks on a state rather than to the specific, atomized attack that ultimately instigated defensive force. *Ad bellum* proportionality, in this view, means that “force, even if it is *more* intensive than [the *casus belli*] is permissible so long as it is not designed to do anything more than protect the territorial integrity or other *vital interests* of the defending party.”<sup>381</sup> The italicized phrase, plainly, invites abuses, but the aggregative view is much more realistic than the atomized view. Hence, when the United States responded to 9/11 by not only targeting al-Qaeda training camps, but by invading Afghanistan and ousting the Taliban, few condemned it even though it had violated *ad bellum* proportionality as elaborated by the ICJ. In part, this may be because of the unprecedented scale of the attack on U.S. soil. But it is also because the aggregative view reflects a more accurate conception of *ad bellum* proportionality, which is better suited to modern warfare and more likely to be accepted by states.

The U.S. invasion may be deemed *ad bellum* proportionate because it responded, not to a single attack, but to a series of attacks by al-Qaeda, including the 1998 embassy bombings and the 2000 bombing of the *U.S.S. Cole*, and because the Taliban offered al-Qaeda a friendly host state. Israel’s decision to attack Hezbollah in 2006 likewise reflected the aggregative view

378. Jennings, *supra* note 360, at 89 (quoting Daniel Webster’s correspondence with Great Britain).

379. Webster wrote that “[i]t must be shown,” among other things, “that admonition or remonstrance to the persons on board the *Caroline*,” which British forces destroyed, “would have been unavailing.” *Id.* (internal quotation marks omitted); see also Hurka, *supra* note 14, at 37-39.

380. Frederic L. Kirgis, *Some Proportionality Issues Raised by Israel’s Use of Armed Force in Lebanon*, ASIL INSIGHTS, Aug. 17, 2006, <http://www.asil.org/insights060817.cfm>.

381. *Id.* (emphasis added). The limitation to “vital interests” is indispensable. It would be untenable to count, among the relevant goods on the *ad bellum* scale, the fact that, for example, fighting a war would lift a state’s economy “and the world’s economies out of [a] recession, as World War II ended the depression of the 1930s,” or that war “may boost scientific research and thereby speed the development of technologies such as nuclear power.” Hurka, *supra* note 14, at 40.

of *ad bellum* proportionality. After all, the immediate impetus for Israel's resort to force did not justify the scale of its attack. The question, however, is whether Hezbollah's attacks, in the aggregate and over time, did.<sup>382</sup> That Israel's initial resort to force, in this view, may be deemed *ad bellum* proportionate does not, of course, imply that Israel made either a prudent or an advisable decision. But on the aggregative view of *ad bellum* proportionality, it made a lawful one relative to Hezbollah.

Given the nature of modern warfare, the aggregative view of *ad bellum* proportionality is inevitable. In increasingly common scenarios of asymmetrical power, nonstate belligerents will characteristically use force intermittently. This means, typically, a series of discrete strikes, no one of which, considered in isolation, will suffice as an "armed attack" under *Nicaragua*. But small-scale, irregular attacks, even cross-border incursions, of this kind have become more the rule than the exception today. The legal question can no longer be, as *Nicaragua* said, whether a small-scale armed incursion transgresses the line between "frontier incident" and "armed attack"; only the latter authorizes self-defense.<sup>383</sup> States, animated by, among other forces, domestic political pressures, will at some point decide that, in the aggregate, a series of discrete, comparatively trivial attacks by nonstate actors operating from the territory of a host or failed state justifies self-defense. The ICJ's contrary insistence on the parsimonious, atomized view of *ad bellum* proportionality simply encourages states to disregard it and, in some cases, eviscerates it as an independent regulatory constraint on force. It also unjustifiably condemns as unlawful many perfectly reasonable and appropriate uses of defensive force.

In contrast to *ad bellum* proportionality, which often involves a partially subjective judgment about one side's *casus belli*, its *in bello* analogue strives to be agnostic and objective relative to the asserted *casus belli*. Each discrete application of force must be proportional in that it not inflict harm that is excessive relative to the *concrete* military advantage sought in *particular* instances.<sup>384</sup> The goal to which that military advantage contributes should not matter. *In bello* proportionality does not involve balancing a range of *in bello* harms (civilian death, injury, property destruction) against ultimate *ad bellum* rationales for resort to armed force (self-defense, humanitarian intervention, territorial conquest). It rather specifies a concrete conception of military necessity that is tied closely to operational judgments made by military strategists based on the particular facts on the ground.

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382. Hurka, in the just war context, draws a critical distinction in this regard between "sufficient" and "contributing" just causes that applies equally to law. Some "goods," such as deterring an enemy, may not be sufficient to authorize the initial resort to armed force. Yet once a state responds in self-defense, those goods may legitimately be counted as aims of defensive force. Hurka, *supra* note 14, at 41. In *Oil Platforms*, for example, it would have been unlawful for the United States to attack Iran's offshore oil platforms to deter Iranian attacks on neutral vessels *preemptively*. But once the *Sea Isle City* had been struck by a missile and the *Samuel B. Roberts* mined by Iran, it became legitimate for the United States to consider, as a matter of *ad bellum* proportionality, that attacks on the offshore oil platforms would *deter* comparable attacks threatening vital U.S. interests in the future.

383. Greenwood, *supra* note 222, at 381.

384. See, e.g., Protocol I, *supra* note 30, art. 51(5)(b); cf. Rome Statute, *supra* note 152, art. 8(2)(a)(iv).



So for *in bello* proportionality, the answer to the question “proportional to what?” is not, as it is for *ad bellum* proportionality, the military necessity or the *casus belli*. It is the “incidental loss to civilian life, injury to civilians, damage to civilian objects, or a combination thereof,” and the question is whether those harms “would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>385</sup> The details of this principle, too, urgently need to be worked out more concretely than they have been to date.<sup>386</sup> The Prosecutor’s Report on Kosovo incisively observes that *in bello* proportionality requires answers to, among other perplexing questions, the following:

- a) What are the relative values to be assigned to the military advantage gained and the injury to non-combatants or the damage to civilian objects?
- b) What do you include or exclude in totaling your sums?
- c) What is the standard of measurement in time or space? and
- d) To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects?<sup>387</sup>

The problem is not that international law provides the wrong answers to these questions; it is that often it provides *no* answer or only a very abstract one. Given the emerging geopolitical, strategic, and technological trends of twenty-first-century conflicts, whether the dualistic axiom can be preserved today depends in part on whether *in bello* proportionality can be operationalized in detail and coherently without reference to *ad bellum* goals.

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The ICJ’s pathological *dispositif* in *Nuclear Weapons* is emblematic of the true cost of conflation: it degrades the efficacy and normative force of both *ad bellum* and *in bello* law. It leads to a failure to apply them properly, or at all, and therefore encourages a more violent world public order, characterized by more needless suffering and human rights violations than would be the case were each component of the law of war applied rigorously. The *Nuclear Weapons* opinion also shows why the postwar, humanized law of war tries, at least, not to confuse the interests and values of abstractions, like states, with those of concrete human beings. The dualistic axiom will doubtless come under pressure in the twenty-first century, as it has already. But it remains indispensable to IHL based on our historical experience with the political and moral reality of war. The law of war must strive, even while recognizing and confronting modern challenges candidly, to preserve the axiom and maintain a rigorous analytic distinction between the legality of, respectively, the initiation and conduct of hostilities—even if, inevitably, it

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385. Protocol I, *supra* note 30, art. 57(2)(a)(iii) (emphasis added); see also H CJ 796/02 Pub. Comm. Against Torture v. Gov’t of Israel, [2006] ¶ 46 (stressing that military advantage must not be speculative but rather direct and anticipated).

386. Fenwick, *supra* note 153, at 545–46.

387. ICTY REPORT, *supra* note 294, at 1271 (2000); see also MICHAEL WALZER, *Two Kinds of Military Responsibility*, in ARGUING ABOUT WAR, *supra* note 18, at 23; Amichai Cohen & Yuval Shany, *A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killings Case*, 5 J. INT’L CRIM. JUST. 310, 316 (2007); Hurka, *supra* note 14.

does not always realize its aspiration. For the dualistic axiom can rightly be hailed as one of the paramount achievements of the postwar law of war.